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NO. 1139

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

GULF STEVEDORE CORPORATION, ET AL,
Petitioners

v.

BERTRAM A. WATSON AND
R. J. SHEA, DEPUTY COMMISSIONER,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BERTRAM A. WATSON AND
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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit initially rendered in the above entitled case on June 28, 1968, with Petitioners' timely Joint Petition for Rehearing En Banc denied on December 9, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is unpublished, but is set forth in Appendix C. The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 400 F.2d 649 (5th Cir. 1968) and is set forth in Appendix B. Thereafter Gulf Stevedore Corporation, et al., filed a Petition for Rehearing before the Court of Appeals. In view of an analogous problem involving the standard of review of administrative orders under the Administrative Procedure Act arising in another case from this office also on appeal to the Fifth Circuit,[1] a Joint Petition for Rehearing En Banc was filed with the Circuit Court which was thereafter denied in a separate opinion as yet unpublished but set forth in Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the District Court was predicated upon 28 U.S.C. §1332.

QUESTIONS PRESENTED

I.

Whether by its pronouncement in this case as to the meaning of total and permanent disability under the Longshoremen's and Harbor Workers' Compensation Act, the United States Court of Appeals for the Fifth Circuit has declined to follow the clear congressional mandate as to its statutory function and has employed instead an "administrative-judicial system" policy test in reviewing

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1. *Young & Company, et al v. R. J Shea, Deputy Commissioner, et al,* 397 F.2d 185 (5th Cir. 1968).

an award of an administrative agency under the Administrative Procedure Act.

Evidence of such impropriety can be clearly discerned from the following:

(a) By the Fifth Circuit having now receded, apparently without mature consideration in view of unqualified affirmations in its other decisions to the contrary, to the nebulous and inconsistent standard applied by Courts prior to the passage of the Administrative Procedure Act in 1948 when it now openly proclaims in two opinions in the present case that "the scope of judicial review of administrative decisions under the Longshoremen's and Harbor workers' Act has not changed as a result of the adoption of the Administrative Procedure Act".

(b) By the Fifth Circuit restricting the scope of review of an administrative order without applying the clear standard contained in the Supreme Court's decision in *Universal Camera* which makes it unqualifiedly clear that the Administrative Procedure Act did not narrow, but significantly broadened the reviewing Court's function, so that the reliable-probative-and-substantial-evidence-upon-a-consideration-of-the-whole-record-test is violated in this case.

II.

Whether the decision of the United States Court of Appeals for the Fifth Circuit so weakens the structure of the Longshoremen's Act that the statutory provisions at issue thereby undergo judicial amendment so as to become wholly inconsistent with the clear intent and

stated language of the Congress in passing such legislation:

Evidence of such judicial legislation can be discerned from the following:

(a) By the Fifth Circuit's interpretation of Sections 908(a), 908(b) and 914(m) of the Act so as to permit a Deputy Commissioner to award unlimited compensation at will without the obligation to satisfy the reliable-probative-and-substantial-evidence-upon-a-consideration-of-the-record-as-a-whole-test of the Administrative Procedure Act.

(b) By the Fifth Circuit's decision accomplishing by judicial fiat what the Bureau of Employees Compensation has been and is presently attempting to do through a proposed Congressional amendment to the Longshoremen's Act.

(c) By the Fifth Circuit's ignoring the statutory burden of proof which a Claimant as the moving party must satisfy at a formal hearing and instead shifting the burden to the employer and its carrier to move for modification of the adverse award under Section 922 of the Longshoremen's Act after the Deputy Commissioner has deprived them of the Act's monetary statutory limitations by finding a temporary total disability case to be total and permanent.

III.

Whether the substantial evidence test of the Administrative Procedure Act, while recognizing the necessity of broad discretion accorded to a Deputy Commissioner at

a formal hearing in making findings of fact, also continues to obligate him to be objective and impartial to all parties.

Evidence of the sanctioning of excesses not contemplated by the Administrative Procedure Act can be discerned from the following:

(a) By the Fifth Circuit upholding the compensation order of the Deputy Commissioner awarding permanent total disability on the basis of findings of fact which have no reliable, probative and substantial evidence in the record when considered as a whole.

(b) By the Fifth Circuit refusing to consider the partiality, bias and prejudice of the Deputy Commissioner evidenced by the record at the formal hearing when such considerations go to the very heart of the substantial evidence test and the weight to be accorded the Deputy Commissioner's findings of fact on review under the Administrative Procedure Act.

STATUTES INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §901 et seq., is involved in this appeal, particularly Sections 908(a), 908(b), 914(m) and 922. These sections of the Longshoremen's Act as well as section 31.19 of the Regulations Governing the Administration of the Longshoremen's and Harbor Workers' Compensation Act are set forth in Appendix F.

The Administrative Procedure Act, 5 U.S.C.A. §551 et seq., is involved in this appeal, particularly Section 556(d). That section of this Act is set forth in Appendix F.

STATEMENT OF THE CASE

Contrary to a prosaic recitation of the factual background so frequently found in the usual compensation claims of a longshoreman processed under the Longshoremen's Act, the genesis of the present *Watson* decision and the subsequent legal complexities actually stemming from it involve consideration of two separate and distinct injuries occurring some eight years apart, resulting in three separate lawsuits and two appeals prosecuted on behalf of the same claimant by the same counsel.

Growing out of the first injury of February 6, 1957, to Bertram A. Watson, was a compensation claim for injuries to the left leg while working aboard the SS SAN DIMITRIS for which the employer, Gulf Stevedore Corporation, and its compensation carrier, Texas Employers Insurance Association, voluntarily paid compensation less time worked until the statutory maximum of $17,280 was reached; indeed such voluntary payments slightly exceeded this amount.[2] Medical care included operations on the left leg in an effort to save it which involved skin grafting from the donor or right leg, but in 1962 the left leg was amputated below the knee.[3] Thereafter Respondent Watson was fitted with a prosthesis or artificial limb, and he returned to longshore work at the docks which he worked with regularity from November, 1962, to April, 1966.[4]

As a consequence of the same accident to Bertram Watson on February 6, 1957, a lawsuit was filed by counsel on his behalf directly against his employer, Gulf Stevedore Corporation, an independent contracting shore-

2. R. 146.

3. R. 146.

4. Appendix Exhibit E.

side entity. This suit was filed on August 1, 1963, some three months after the United States Supreme Court decision in *Reed v. The SS YAKA*.[5] The suit was dismissed on Motion for Summary Judgment by the District Court.[6] The District Court was affirmed by the Fifth Circuit,[7] following which rehearing was denied. Petition for Certiorari to the United States Supreme Court was applied for and denied on November 6, 1967.[8]

Yet even before the *Yaka* type suit was filed, Watson had returned to work as a longshoreman in November, 1962, and worked with regularity, utilizing a prosthesis while earning wages comparable to and at times in excess of his prior earnings at the waterfront.[9] As a longshoreman possessing high seniority (a gold star button for twenty-five years service), Watson had access to preferred jobs and actually worked as a foreman at times. He was so employed for approximately two years and nine months when an entirely separate and distinct injury occurred.

In August, 1965, Respondent Watson had a second waterfront accident, this time claiming injuries to his low back and groin, which resulted in the surgical removal of the right testicle.[10] In this instance a damage suit was filed against the third party vessel owner, Tarpon Shipping Company, in the United States District Court for the Southern District of Texas on August 27, 1965, desig-

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5. 373 U.S. 410 (1963).

6. 257 F. Supp. 503 (S.D. Tex. 1965).

7. 374 F.2d 946 (5th Cir. 1967).

8. 389 U.S. 927 (1967).

9. Appendix Exhibit E.

10. R. 149.

nated as Civil Action No. 65-H-530, and styled *B. A. Watson v. Tarpon Shipping Company*. The Complaint alleged damages in the sum of $250,000 and further alleged among other damage counts a loss of earning capacity resulting from this August, 1965 accident.[11]

Watson had returned to longshore work following recovery from the accident and groin operation in 1965, which employment he pursued until April, 1966 when an operation for the removal of a small ulcer appearing on the end of the stump of the left leg was performed.[12] At the time of the formal hearing before the Deputy Commissioner on November 4, 1966, in connection with the claim for permanent total disability from the injury of February 6, 1957, there were thus two damage suits and a compensation claim being prosecuted by Respondent Watson stemming from two separate accidents, the *Yaka* suit and the present compensation claim related to the leg injury occurring in 1957, and the injury to the groin occurring in 1965. Although not in litigation at the time, there was also information developed to the effect that Watson had sustained a prior shoulder injury in 1953 while working for another employer, and that the doctor who had seen Watson in 1953 had rendered a report finding some permanent disability to his right shoulder.[13] This was the posture of the known lawsuits and claims at the time of the formal hearing.

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11. Appendix Exhibit H. On May 13, 1968 the Plaintiff's action against Tarpon Shipping Company in connection with the 1965 injury was settled for $15,000. Total compensation paid on the 1957 leg injury in view of the District Court's stay order increased to $18,846 and medical payments total $19,379.85.

12. R. 147.

13. R. 149.

Under such circumstances Petitioners were obligated to approach the impending formal hearing so as to meet two basic issues: (1) the injury to the claimant's left leg under the provisions of the Longshoremen's Act was a permanent partial disability which at the time of the 1957 injury obligated the employer and compensation carrier to pay its statutory maximum of $17,280 in compensation plus medical benefits to its employee, Respondent Watson, and this has been voluntarily paid and actually slightly exceeded. Inasmuch as Watson had worked with regularity between 1962 and 1965 after a prosthesis was fitted, there was no basis for considering Respondent as a permanent total case under the Act. (2) If any total and permanent rating was to be considered by the Deputy Commissioner, Petitioners would have the right to develop the full record at a formal hearing so as to have the opportunity to show that such total and permanent disability was the result of two or more industrial injuries, thereby implicating the Second Injury Fund provisions of the Longshoremen's Act[14] whereby the employer and compensation carrier would only be obligated to respond for that portion of the total disability to which the injury of February 6, 1957, had actually contributed.

These defenses were precisely set forth by Petitioners at the commencement of the formal hearing of November 4, 1966,[15] and it is the Formal Order issued by the Deputy Commissioner following the formal hearing awarding permanent total disability[16] which the District Court properly set aside on review as not comporting with the

14. 33 U.S.C.A. §908(f).

15. R. 7-8.

16. R. 145.

law[17] and which Respondents now have persuaded the Fifth Circuit to reinstate.[18]

REASONS FOR GRANTING THE WRIT

There are several compelling reasons why a review on Writ of Certiorari should be granted in this case:

1.

By pronouncing that the scope of judicial review was not changed by the enactment of the Administrative Procedure Act and applying such lesser standard in this case, the Fifth Circuit has abandoned its established judicial function in reviewing administrative orders and regressed to pre-Administrative Procedure Act criteria which places this decision in conflict with decisions of this Court as well as other decisions emanating from the Fifth Circuit on the same point of law.

(a) The Supreme Court decisions in conflict with Watson:

(1) *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 95 L.Ed. 456 (1951).

(2) *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 95 L.Ed. 483 (1951).

(3) *O'Keeffe v. Smith, Hinchman & Grylis, Associates*, 380 U.S. 359, 13 L.Ed.2d 895 (1965).

(b) Fifth Circuit Decisions in conflict with Watson.

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17. Appendix C.

18. Appendix B.

(1) *Calbeck v. Strachan Shipping Company*, 190 F. Supp. 255 (S.D. Tex. 1961) aff'd 306 F.2d 693 (5th Cir. 1962) cert. den. sub.nom.; *Gee v. Strachan Shipping Co.*, 372 U.S. 954 (1962).

(2) *N.L.R.B. v. O. A. Fuller Supermarkets, Inc.*, 374 F.2d 197 (5th Cir. 1967).

(3) *J. P. Goins v. Noble Drilling Corp., et al.*, 397 F.2d 392 (5th Cir. 1968).

This Court should grant this Writ to resolve this conflict.

2.

This decision raises critical questions concerning construction of the Longshoremen's Act and consequently of federal law as well which should be settled by this Court. Until now no case has ever held that a Deputy Commissioner could award permanent total compensation benefits by relying solely on the basis of lay testimony from the Claimant to the exclusion of all of the medical testimony including that pertaining to a course of rehabilitative treatment, the success of which was testified to without contradiction to be "reasonably and medically probable".

By interpreting Section 908(a) of the Longshoremen's Act relating to total and permanent disability so broadly so as to engulf and thereby obliterate the significance of Section 908(b) pertaining to temporary total disability, this decision judicially amends the Act by eliminating any meaning to Section 914 (m) which prescribes a specific monetary limit on compensation benefits; instead by virtue of this decision a Deputy Commissioner can arbitrarily find

permanent total disability without the support of reliable, probative and substantial evidence in the record when considered as a whole.

3.

This decision ignores the statutory burden of proof which a Claimant as the moving party must satisfy at a formal hearing for compensation benefits, and by arming a Deputy Commissioner with such unlimited power to label an injury as permanent and total, the burden is shifted to the employer to disprove such rating by moving for modification during which time compensation in excess of that prescribed in Section 914(m) is obligated to be paid.

Not only does this decision give a Deputy Commissioner carte blanche authority to declare a Claimant permanently and totally disabled, regardless of the presence or absence of reliable, probative and substantial evidence in the record when considered as a whole, it also sanctions such findings of a Deputy Commissioner without any consideration whatsoever as to whether the formal hearing was conducted with objectivity and impartiality as to all parties as required by the Administrative Procedure Act and the due process clause of the Constitution. By its holding, this decision has so far departed from the accepted and usual course of judicial proceedings as to call into play this Court's power of supervision in order to rectify the resulting injustices.

REASON ONE

Commencing with the Circuit Court's opening observations in its original opinion in which it set a course to try to justify the application of what can best be designated as an "administrative-judicial system" policy test,

encompassing a lesser standard than Congress prescribed in reviewing a Deputy Commissioner's compensation order, and concluding with the observations contained in the opinion denying Joint Petition for Rehearing En Banc, this case holding is contrary to law. Although obeisance is paid in both instances to the reliable, probative and substantial evidence rule (herein called the reliable-probative-substantial-evidence-upon-consideration-of-the-whole-record -test) as if the Court were actually applying it to the circumstances of this case, the thrust of the decision is directly to the contrary. This is of critical importance in this case, since the total permanent award to Watson cannot stand and must be set aside as failing to meet the substantial evidence test contained in the Administrative Procedure Act. The District Court did so only to have the compensation award reinstated by the Circuit.

The Circuit Court makes its stand perfectly clear when it states in both its original opinion and in the opinion denying the Joint Motion for Rehearing En Banc that "the scope of judicial review of administrative decisions under the Longshoremen's and Harbor Workers' Act has not changed as a result of the adoption of the Administrative Procedure Act." This is not an accurate statement of the law, or if it is an accurate statement of the law today, it is a serious indictment of our Federal judiciary since 1948 for having utterly and completely failed to accept the responsibility for reviewing administrative orders which Congress provided for in the Act.

Prior to the passage of the Administrative Procedure Act, a situation existed in which Courts, out of frustration and despair, felt obligated to give their blessing and approval to almost any administrative award having the

slightest semblance of support in the record without weighing the evidence to the contrary to see if the award was in truth, supported by substantial evidence. The vague and inconsistent nature of such procedural standard existing prior to the enactment of the Administrative Procedure Act was analyzed in detail by Mr. Justice Frankfurter in Section I of the Opinion in *Universal Camera Corp. v. N.L.R.B.*:[19]

> The *concept of substantial evidence* soon lent itself to the notion "that it was enough that the *evidence supporting the Board's result was 'substantial' when considered by itself. . .*" (emphasis supplied)

There were accusations of partisan bias. . . The "irresponsible admission and weighing of hearsay, opinion and emotional speculation in place of factual evidence" was said to be a "serious menace". . . *Protests against "shocking injustices" and intimations of judicial "abdiction" stimulated pressures for legislative relief from alleged administrative excesses.* (Emphasis supplied). The Senate version ultimately became the law, and in passing this legislation, Congress expressed a mood. . . It left no room for doubt as to the kind of scrutiny which a Court of Appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof. "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. . . *It was emphasized that Judges are not automata*" (rubber stamps).

Mr. Justice Frankfurter concluded that the Adminstrative Procedure Act directs that "Courts must now assume

19. 340 U.S. 474, 95 L.Ed. 456 (1951).

more responsibility for the reasonableness and fairness of Labor Board decisions than some Courts have shown in the past." (In other words, although some Courts before the Act's passage may have applied a proper standard at times on their own, the Act was to insure that such compliance was not happenstance, but rather that a clear, uniform application resulted in all cases.) "Reviewing Courts must be influenced by a feeling that *they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds.*" (Emphasis supplied)

It was such a situation which precipitated Congressional action that clarified an appellate Court's role as a reviewing Court. The fruit of these Congressional efforts—the Administrative Procedure Act—caused the Supreme Court, after an exhaustive review of its legislative history, to proclaim that a new day in judicial review of administrative orders had arrived.[20]

The thrust of *Universal Camera* can leave no doubt as to what Congress intended as a standard of review when it passed the Administrative Procedure Act and what the Supreme Court understood that Congress intended. Thorough analysis will reveal that the *Watson* case is one of the instances in which the standard of review has been grossly misapprehended and misapplied. This situation calls for Supreme Court action to prevent an injustice from resulting in this case and to avoid distortion of the meaning and intent of the Act whenever it is applied in the future in the Fifth Circuit or any other circuit.

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20. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 477, 71 Sup. Ct. 456, 95 L.Ed. 456, 462 (1951).

That the holding and spirit of *Universal Camera v. N.L.R.B.* apply equally to cases under the Longshoremen's Act is clear from *O'Leary v. Brown-Pacific-Maxon, Inc.*,[21] and *O'Keeffe v. Smith, Hinchman & Grylls Associates.*[22] The Circuit Court must look elsewhere than to *O'Keeffe* to find a return to pre-Act criteria, since the opinion is explicit that the reliable-probative-and-substantial-evidence-upon-consideration-of-the-whole-record-test on reviewing an administrative order remains intact. The Supreme Court in *O'Keeffe* eliminated any doubt as to the standard to be employed when it stated as follows:

> "Since we believe that the Deputy Commissioner and the District Court properly applied the Brown-Pacific-Maxon standard, and since we deem it necessary to preserve the integrity of the administrative process established by Congress to effectuate the statutory scheme the judgment of the Court of Appeals is reversed."[23]

Moving to *O'Leary*, it is of paramount interest that its significance be understood, since this case was decided on the same day in an opinion by the same Justice who wrote the opinion in *Universal Camera*. With both parties conceding that the scope of judicial review of a Deputy Commissioner's findings was governed by the Administrative Procedure Act, the Court held that "the standard, therefore, is that discussed in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 at 456, 71 S.Ct. 456. It is sufficiently described by saying that the findings are to

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21. 340 U.S. 504, 95 L.Ed. 483 (1951).

22. 380 U.S. 359 (1965).

23. 380 U.S. at 365.

be accepted unless they are unsupported by substantial evidence on the record considered as a whole."[24]

With the chain of consistency in approach linking *O'Keeffe* with *O'Leary* and *O'Leary* with *Universal Camera,* it is obvious that the *fons et origo* of the standard of review of administrative orders under the Administrative Procedure Act is *Universal Camera.* It is also only too apparent that the Fifth Circuit opinion in Watson is in conflict with all three of these decisions and that a writ should be granted to resolve the conflict.

It is of additional significance to examine the opinions relied upon by the Fifth Circuit in its opinion denying the Joint Motion for Rehearing En Banc to support its position that "the Administrative Procedure Act did not change the scope of judicial review of the Deputy Commissioner's findings." Pre-Act decisions of this Court do not reflect the application of the reliable-probative-and-substantial-evidence-upon-a-consideration-of-the-whole-record test at all. *Voehl v. Indemnity Insurance Company of North America*[25] applied no such broad standard, stating that "we think that there can be no doubt of the power of the Congress to invest a Deputy Commissioner, as it has invested him, with authority to determine these questions after proper hearing and upon *sufficient evidence.* And when the Deputy Commissioner makes such a determination, his findings of fact *supported by evidence* must be deemed to be conclusive." (Emphasis supplied) Nor does *South Chicago Coal & Dock Co. v. Bassett,*[26] so hold.

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24. 340 U.S. at 508.

25. 288 U.S. 162 (1933).

26. 309 U.S. 251, 84 L.Ed. 732 (1940).

In its opinion it is recited that "the District Court in reviewing the finding of the Deputy Commissioner was precluded from weighing the evidence, being required to examine the record and ascertain whether there was any *evidence to support* the Commissioner's findings."[27] The Court of Appeals was viewed as having held correctly that the Deputy Commissioner's finding, "if there *was evidence to support* it, was conclusive that it was a duty of the District Court to ascertain whether it was so supported and, if so, to give it effect without attemping a re-trial." (Emphasis supplied)[28]

Cardillo v. Liberty Mutual Insurance Company[29] is cited as support in both Fifth Circuit opinion in *Watson. Cardillo* relies upon *Voehl* and *Bassett,* which of itself militates against the case standing for the proposition that the scope of judicial review before and after the passage of the Administrative Procedure Act was the same. The clincher, however, is this Court's decision in *Universal Camera.* Before passage of the Act "substantial evidence" did not mean the same as it uniformly does today. As Mr. Justice Frankfurter stated in *Universal Camera,* the concept of substantial evidence before passage of the Administrative Procedure Act soon lent itself to the notion "that it was enough that the evidence supporting the Board's result was 'substantial' when considered by itself. . .[30] Not only does the exhaustive chronological account of the inconsistent standards applied by some courts before passage of the Act as recited in

27. 309 U.S. at 253.

28. 309 U.S. at 258.

29. 330 U.S. 469, 91 L.Ed. 1028 (1947).

30. 340 U.S. at 478.

Universal Camera negative such an interpretation of *Cardillo,* but also the legislative history of the Act does so. In excerpts from proceedings of the Senate[31] it was pointed out that the *rule was being changed* so that "any evidence" or merely a "scintilla of evidence" would be insufficient. The new day heralded by the adoption of the Administrative Procedure Act was a response to pressures for stricter and more uniform practice. That the Administrative Procedure Act constituted a new departure from the former procedure or lack of it is beyond question. It was thereafter described as a "new, basic and comprehensive regulation of procedures. . ." *Wong Yang Sung v. McGrath.*[32]

Since the passage of the Administrative Procedure Act, the law as it has been applied heretofore in the Fifth Circuit has always required the use of reliable-probative-and-substantial-evidence-upon-a-consideration-of-the-whole-record test. The Fifth Circuit's decision in *Calbeck v. Strachan Shipping Company*[33] is a perfect illustration of this fact. In that case, the Deputy Commissioner resolved a doubtful fact issue in favor of the employee's dependent family and found there was a causal relationship between the employees' injury from inhaling fertilizer dust and his death from lung cancer and awarded compensation benefits. In affirming the District Court's reversal of the Deputy Commissioner's finding, the Circuit Court held that the Deputy Commissioner's finding could not be sustained because it was not supported by the

31. Exhibit G.

32. 339 U.S. 33, 94 L.Ed. 616 (1950).

33. 190 F. Supp. 255 (S.D. Tex., 1961), aff'd 306 F.2d 693 (5th Cir. 1962), cert den. sub. nom. *Gee v. Strachan Shipping Co.,* 372 U.S. 954 (1962).

reliable-probative-and-substantial-evidence-upon-consideration-of-the-whole-record-test.

Most recently the Fifth Circuit in *J. P. Goins v. Noble Drilling Corp.*[34] once again reiterated that the scope of judicial review of the Deputy Commissioner's findings of fact in a Longshoremen's Act case is governed by the Administrative Procedure Act and that the standard to be applied is that "the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole" citing *O'Leary* and *Universal Camera.* Equally as important, it is stated in *Goins* that "the review, however, is not to be a mere rubber stamping of the Deputy Commissioner's order when the reviewing Court is unable to conscientiously conclude that the evidence supporting such decision is substantial. *N.L.R.B. v. O. A. Fuller Supermarkets, Inc.*, 5th Cir. 1967, 374 F.2d 197."[35]

The Fifth Circuit in Watson quotes from *O'Keeffe v. Smith, Hinchman & Grylls Associates* and uses the much misunderstood language that "inferences drawn by the deputy commissioner are to be accepted 'unless they are irrational or unsupported by substantial evidence on the record . . .as a whole' "[36] as a basis for its holding. This statement is a reaffirmation of the Administrative Procedure Act rule, but the Fifth Circuit apparently only sees the words, "unless they are irrational," and concludes that so long as the Deputy Commissioner's findings are not "irrational" they must be accepted. This is not what the Supreme Court said in this sentence, a

34. 397 F.2d 392 (5th Cir. 1968).

35. 397 F.2d at 394.

36. 400 F.2d 653.

point which is clearly seen if the sentence is read with care and understanding. The Deputy Commissioner's findings must be sustained unless

1. "They are irrational"

OR

2. "Unsupported by substantial evidence on the record as a whole." This does not require the Deputy Commissioner's findings be both "irrational" AND "unsupported" as the Fifth Circuit apparently has concluded before they must be set aside by a reviewing Court. Regardless of how "rational" or "irrational" the Deputy Commissioner's findings may be, this sentence from *O'Keeffe* makes it perfectly clear that they must be set aside if they are "unsupported by substantial evidence on the record as a whole."

The only way in which the Fifth Circuit's decision can be upheld is through the employment of a lesser standard of review of the record in this case so that the Deputy Commissioner's findings will not be subjected to the scrutiny which the Act requires. With both Fifth Circuit opinions in *Watson* resting on false premises as to the legal standard to be applied in reviewing the compensation order, they stand in clear conflict with the decisions of the Supreme Court and indeed other opinions from the Fifth Circuit, and the writ should be granted to resolve such conflict.

REASON TWO

As a result of the Fifth Circuit's decision in this case reinstating the Deputy Commissioner's award of perma-

nent total disability, despite the fact that the entire record upon review does not meet the reliable-probative-and-substantial-evidence-upon-a-consideration-of-the-whole-record-test, the Longshoremen's Act has been judicially amended. Such an arbitrary holding raises an important question of federal law which this Court should resolve so that interminable confusion in the administration of this federal statute does not result.

Three sections of the Longshoremen's Act are involved: (1) that pertaining to permanent total disability,[37] (2) that pertaining to temporary total disability[38] and (3) that pertaining to limits of compensation owed other than in permanent total and in death cases.[39]

The Circuit Court, in short, has interpreted Section 908(a) relating to permanent total disability in such a manner that it swallows-up Section 908(b) pertaining to temporary total disability whenever the Deputy Commissioner arbitrarily decides that it should, thereby excising from the Act Section 914(m) which places a monetary

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37. Section 908(a) Permanent Total Disability: "In case of total disability adjudged to be permanent 66⅔ percentum of the average weekly wages shall be paid to the employee during the continuance of such total disability . . ."

38. Section 908(b) Temporary Total disability: "In case of disability total in character but temporary in quality 66⅔ percentum of the average weekly wages shall be paid to the employee during the continuance thereof."

39. Section 914(m) "The total money allowance payable to employee as compensation for an injury under this Act shall in no event exceed in the aggregate the sum of $24,000: provided, that this limitation shall not apply to cases of permanent total disability or death . . ." (NOTE: At the time of this accident to Bertram Watson in 1957, the total money allowance or monetary ceiling payable under this Section of the Act was $17,280).

ceiling on compensation benefits awarded except in cases of permanent total disability or death.

The rationale employed by the Fifth Circuit in sustaining the Deputy Commissioner's action is important. Having justified the application of a lesser standard of review than the reliable-probative-and-substantial-evidence-upon-a-consideration-of-the-whole-record-test pronounced in *Universal Camera* and *O'Leary,* the Court applies such lesser standard and affirms the Deputy Commissioner's Findings by analyzing why the Claimant's condition should be viewed as permanent, even though the medical testimony in a highly complicated medical case was unanimously to the contrary with no doctors so much as appearing for the Claimant. The Deputy Commissioner's action in substituting his lay opinion under such circumstances as to what constitutes "a normal healing period", before the rehabilitative steps testified to by the specialists had been tried and any curative medical plateau had been reached, was upheld by the Circuit Court. Permanency of disability was thereby held to comport with only a period of months following an operation to remove a newly formed ulcer during which time improvement was noted. The fact that the doctors could not pinpoint the precise date of recovery, since the rehabilitative procedures had not run their course, was held to support the remarkable conclusion that such condition was of "lasting or definite duration", warranting a permanent total disability rating.

A comparison of the language of Section 908(a) pertaining to permanent total disability and Section 908(b) pertaining to temporary total disability reveals the significance of this Court reviewing the record pursuant to

the reliable-probative-and-substantial-evidence-from-a-consideration-of-the-whole-record-test pronounced in *Universal Camera*. Section 908(b) recites that temporary total disability is to be paid to the employee *during the continuance thereof*. However, this Section is modified by Section 914(m) which sets forth that the total money allowance for any injury under this Act shall not exceed $17,280 (which was the statutory limit in 1957 when the injury occurred) except for permanent total disability or death. This necessarily means that this statutory limit places a ceiling on compensation owed in the present case, unless there is a valid basis for permanent total disability following a consideration of the record as a whole as *Universal Camera* clearly requires. There must be some reliable, probative and substantial basis for distinguishing a case of temporary total disability from one of total permanent disability; otherwise, there would be no reason for the two statutory subdivisions.

After stating that the Longshoremen's Act does not define the term "permanent total disability", the Circuit Court proceeds to accord to a Deputy Commissioner sufficient legerdemain to transpose a temporary condition into a permanent one. The term "permanent" is determined to mean not only eternal or everlasting, but also to pertain to disability of a lasting or continuous nature or that it will be long continuing.[40]

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40. The state court cases relied upon by the Fifth Circuit at 400 F.2d 654 are cited in Schneider, *Workmens Compensation Law*, §2309, at p. 445. Not only is there no evidence of disability of a "lasting or long continuing nature" in *Watson*, but also the full test in the cited Ohio case, *Logsdon v. Industrial Comm.*, is that permanent disability is one "in all reasonable probability to continue for some indefinite period of time *without any present indication of recovery therefrom*". Continuation of disability in *Watson* was a few months with a prog-

Most assuredly the record in this case does not support any eternal or everlasting condition, and indeed the unchallenged medical testimony is that in "all reasonable medical probability" it does not support a lasting or continuous or long continuing condition. In short, it is not permanent.

The Circuit Court goes beyond all reason in according to a Deputy Commissioner unlimited latitude regardless of the record as a whole to make findings consistent with the pre-Administrative Procedure Act standard when it states as follows:

> "The statute neither requires that a longshoreman be bedridden before he is considered totally disabled nor that he be pronounced medically incurable before his condition is permanent."[41]

It accomplishes by judicial fiat what the Bureau of Employee's Compensation is presently attempting to do by Congressional amendment of the Longshoremen's Act. It permits the Deputy Commissioner to make almost any case of temporary total disability into one of total and permanent disability and to be sustained by a reviewing Court simply by taking the position that "he (need not) be pronounced medically incurable before his condition is permanent." As a consequence of a failure to apply the reliable-probative-and-substantial-evidence-upon-a-con-

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nosis of recovery. More in keeping with the present case are other authorities contained in Schneider that "permanent injury means lasting through the future life of the injured party (Footnote 16, p. 445) and "disability is permanent where further change, for better or worse, is not reasonably to be anticipated under usual medical standards" (Footnote 20, p. 446).

41. 400 F.2d at 654.

sideration-of-the-whole-record-test pronounced by *Universal Camera,* this decision by the Fifth Circuit results in an excision of the statutory monetary limitation in Section 914(m) of the Act so that any case of temporary total disability lacking a precise, exact point of recovery in the near future which is compatible with the layman's view of a Deputy Commissioner, as to a "normal healing period", regardless of the medical program underway, can be a total and permanent case. Semantics and casuistry return, and a Deputy Commissioner, as he did before the Administrative Procedure Act was passed, and was precluded from doing after the Act was passed, runs without check and without judicial supervision.

As this Court undoubtedly well knows, there are current efforts underway to amend the Longshoremen's and Harbor Workers' Compensation Act. A recent proposed amendment was designated in the Senate as S2485 (1967). The immediate portion of that Bill which is relevant here is Section 3 pertaining to increases in maximum and minimum limits of disability compensation and allowance:

> "Sec. 3. (a) Section 6(b) of Such Act is amended by striking '$70' and substituting '$105', and by striking '$18', wherever it appears, and substituting '$35'. (b) *Section 14 of such Act is amended by striking subsection (m).* (Emphasis supplied)

Apart from the increase in compensation benefits, the significance of the above proposed amendment is that the present statutory limit of $24,000 is removed from cases of temporary total and permanent partial disability so that they, in turn, are eligible for compensation benefits indefinitely as in the case of a permanent total disability

rating. Without weighing the merits of the Senate Bill and its counterpart in the House of Representatives, the fact remains that the legislative body is the one to amend the Act and not the Deputy Commissioner or the judiciary. Yet the Circuit Court's opinion gives the Deputy Commissioner the power to amend the Act at will and to accomplish in a given case exactly the same thing being sought in the Congress.

Unless the Congress decides that the pronouncements of *Universal Camera* and *O'Leary* are no longer the law, it is imperative that the standard of review be uniformly maintained in the Courts. Any other course goes counter to the will of Congress which alone possesses the power to effect a policy change.

REASON THREE

By pronouncing such a free wheeling, permissive and unrestrained standard of operating procedures within which a Deputy Commissioner can function, the statutory burden of proof placed upon a claimant becomes virtually non-existent, and instead such burden is shifted to the employer to seek modification after issuance of the compensation order while being compelled to pay compensation in the interim in excess of the statutory limits. Additionally, such an overzealous and arbitrary approach by the Deputy Commissioner at the formal hearing in this case runs deliberately counter to the built-in safeguards and spirit of impartiality and fair play contained in the Administrative Procedure Act, thereby raising serious questions as to whether the Petitioners were accorded their full rights in accordance with constitutional due process requirements.

In analyzing the provisions pertaining to total and permanent disability, temporary total disability and statutory monetary limitations on compensation to be paid under the Longshoremen's and Harbor Workers' Act, it is easily overlooked that at a formal hearing before a Deputy Commissioner there is a burden of proof to be sustained by the moving party. This is to be found in the Administrative Procedure Act and is as follows:

> ". . . *the proponent of a rule or order has the burden of proof*. . . A sanction may not be imposed . . . or ordered issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative and substantial evidence . . ." (Emphasis supplied)[42]

Yet, consider the record in this case in the light of such a burden of proof. There was no medical testimony on behalf of the Claimant. The Deputy Commissioner relied on the fact that the doctors did not say with certainty when rehabilitation would be complete, even though it would be strange if they did, since it had not yet been determined which of the two alternative rehabilitative methods of treatment would be required. The Claimant put on no medical specialist. With a record devoid of any medical testimony supporting total and permanent disability, the Circuit Court has chosen to affirm without discussion a Deputy Commissioner's compensation order containing a finding that "inasmuch as the Claimant obviously is totally disabled at this time (that is as of December 6, 1966) and since April, 1966, it would be speculation on the part of the Deputy Commissioner to hold

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42. 5 U.S.C.A. 556(d).

this condition not to be permanent".[43] The affirmance of such administrative casuistry is further compounded by tacitly approving the additional finding without any support in the record whatsoever that "it is well established from a medical standpoint he cannot pass a pre-employment medical examination on the open labor market . . ."[44] Nothing was ever so established, and indeed the contrary was apparent since Watson had actually worked for two and one half years at the docks with a prosthesis.

The Circuit Court did not discuss the Deputy Commissioner's findings, the controlling ones actually being based on the rankest sort of speculation. Instead, the Circuit opinion recited that "the Deputy Commissioner's determination that an employee is disabled need not depend upon medical testimony alone, and the Deputy Commissioner may reach this conclusion on the basis of lay testimony,"[45] The only lay testimony is that of the Claimant, and that is demolished by his own work record. Yes, even the authorities relied upon are not controlling or even persuasive under the circumstances present in Watson. In *Todd Shipyards Corporation v. Donovan,* 300 F.2d 741 (5th Cir. 1962), there was actual medical testimony supported by substantial evidence that the inference that the strenuous activity of a deceased precipitated the heart attack was a permissible one. In *Independent Stevedore Company v. O'Leary,* 357 F.2d 812 (9th Cir. 1966), there was actual medical evidence supporting disability following the surgery with no direct testimony insulating the operation from the accident. While medical testimony

43. R. 144, Finding 7.

44. R. 149, Finding 11.

45. 400 F.2d at 654.

alone may not always be necessary for the formulation of a deputy commissioner's determination, the total absence of any medical testimony at all in support of his findings plus the presence of an overwhelming medical record to the contrary cannot conceivably support such findings and yet be squared with the standard of *Universal Camera.*

Consistent with the standard that should be applied by a reviewing Court under the reliable-probative-and-substantial-evidence-from-a-consideration-of-the-whole - record-test is the recent case of *J. P. Goins v. Noble Drilling Corporation, et al.,* (397 F.2d 392) (5th Cir., 1968). In that case following a Deputy Commissioner's award containing no reference to medical reports or analyses of the medical findings of eleven doctors who examined and treated the Claimant, six furnished by the employer and five by the Claimant's attorney, the District Court analyzed the record and concluded that the record as a whole lacked substantial evidence to support the award. Despite the Claimant's testimony and certain reports of doctors reflecting complaints of pain and discomfort by the Claimant, the District Court adhered to the reliable-probative-and-substantial-evidence-from-a-consideration-of-the-whole-record-test pronounced by *Universal Camera* and *O'Leary* and other consistent opinions in this Circuit. The Court further reiterated that the judicial review is "not to be a mere rubber stamping of the Deputy Commissioner's order when the reviewing Court is unable to conscientiously conclude that the evidence supporting such decision is substantial."[46] Nothing more graphically illustrates how the Fifth Circuit has gone astray in Watson by relying on false legal premises than the Circuit's pronouncement

46. 397 F.2d at 394.

in its opinion denying the Joint Petition for Rehearing En Banc that the "sole difference between these cases is that in *Goins* the record lacked substantial evidence to support the findings of the Deputy Commissioner while in *Watson* the evidence was presented and it was substantial."[47] No evidence cannot be substantial evidence, and there was no medical evidence nor any other evidence that Watson had ever attempted to seek other employment which would justify the Court's use of any economic test. The medical testimony was that the probabilities were good that he would be able to return to work.[48]

A further aspect for this Court to consider becomes crystal clear in view of the prior discussion of the standard pronounced by *Universal Camera* and the judicial amendment which Sections 908(a), 908(b) and 914(m) of the Longshoremen's Act have undergone if this decision is to stand. The Claimant had the burden of proof which he did not sustain by any reliable, probative and substantial review of the evidence as a whole at the formal hearing. To strip the employer of its defense against a claim in which the Claimant is statutorily obligated to meet his burden of proof and has failed is unjust; but such injustice is sorely compounded when the Circuit Court permits the Deputy Commissioner to assess permanent total disability at will, thereby removing the statutory limits of Section 914(m), and then shifts the burden to the employer to move for modification of such award during which time it is ordered and compelled to pay compensation in excess of the statutory limits of the Longshoremen's Act on which it has every right to rely. A pseudo-total and permanent rating which was never

47. Appendix A-3.

48. R. 52.

legally proved against the employer by the substantial-evidence-from-a-consideration-of-the-whole-record-test has exposed it to the payment of unlimited compensation, and such administrative action has now received the sanction of the Fifth Circuit.

Although the Circuit Court declined to consider the bias and prejudice to the detriment of the employer and carrier which charged the atmosphere at the time of the formal hearing in this case, one wonders how any Court could conceivably correct such a vice or even be apprised of its existence if the role of the Deputy Commissioner were unchecked and his administrative findings were not subjected to close scrutiny by a reviewing Court.

The so called "administrative-judicial system" policy standard employed in this case is once again found to be wanting unless reviewing courts are no longer to be concerned with whether a hearing is conducted with fairness and impartiality. And yet, it is unquestioned that hearings must be so conducted as the following cases point out:

N.L.R.B. v. Phelps, 136 F.2d 562 564 (5th Cir. 1943);

> "Once partiality appears and particularly when, though challenged, it is unrelieved against, it taints and vitiates all other proceedings, and no judgment based upon them may stand."

N.L.R.B. v. National Paper Company, 216 F.2d 859, 868 (5th Cir. 1965);

> ". . . a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative func-

tionary as when it is done in a Court by a judge." Citing *N.L.R.B. v. Phelps,* supra.

N.L.R.B. v. Miami Coca-Cola Bottling Company, 222 F.2d 341, 345 (5th Cir. 1955);

> "We cannot escape the conclusion that the trial examiner, in uniformly crediting the general counsel's evidence and discrediting all of the respondent's, whether or not the latter was contradicted or corroborated, exhibited that degree of bias which deprives his credibility findings of the weight usually accorded him."

Local No. 3 United Packing House Workers of America, CIO v. N.L.R.B., et al., 210 F.2d 325, 330 (8th Cir. 1954);

> "The manifest prejudice, bias and hostility of the examiner as disclosed by an examination of the record goes far to weaken or destroy the presumption of correctness usually attributed to the findings of the trier of facts. A study of the entire record indicates that this bias and hostility prevailed not only in the weighing of the evidence but in the ruling of the Court in rejecting pertinent evidence offered by the company."

As Petitioners, we cannot believe that this Court really intends to go counter to its previous decisions and jettison the safeguards which were built-in to the Administrative Procedure Act by the Congress as *Universal Camera* so clearly demonstrates. We again respectfully refer the Court to its opinion in that case and to the numerous references to pre-Administrative Procedure Act criticism of partisan-

ship, bias, opinion and emotional speculation and the stressing that judges on reviewing courts are not automata or rubber stamps. The new day heralded by the adoption of the Administrative Procedure Act was a response to pressures for stricter and more uniform practice. In *United States v. Morton Salt Co.*, 338 U.S. 632, 94 L.Ed. 401 (1950) the Act was said to have been ". . . framed against the background of rapid expansion of the administrative process *as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights.*" (Emphasis supplied)[49]

Excessive zeal by the Deputy Commissioner in the conduct of the hearing in Watson resulted in the very vice which the Administrative Procedure Act was intended to guard against—arbitrary official encroachment on private rights. With the posture of the claim immediately prior to the formal hearing one in which Watson's alleged condition could have resulted from one or a combination of as many as three prior injuries and thereby involve the Second Injury Fund,[50] Respondents had every right to develop fully all aspects of all of such injuries. Instead, Respondents were restricted on cross examination by the

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49. The real truth of the matter is that the Deputy Commissioner had made up his mind on Watson's disability before the formal hearing commenced and had so advised counsel for Petitioners at a coffee break prior to the hearing in connection with settlement discussions then underway involving both the 1957 leg and the 1965 groin injuries. Unfortunately, such matters are not in the record, but they furnish ample background for the climate in which the hearing was thereafter conducted.

50. 33 U.S.C.A. §908(f).

Deputy Commissioner assuming a protective role as to injuries concerning Claimant's 1965 groin injury and its relationship to the 1957 leg injury in view of his pending lawsuit against Tarpon Shipping Company. Certain examples of such proceedings should suffice:

Whereas Claimant's counsel was accorded unlimited latitude to pursue inquiries with Dr. Lane as to the condition of osteomyelitis (R. 34-36), the same counsel with the assistance of favorable rulings from the Deputy Commissioner inhibited inquiry into problems of other amputees (R. 50-51), despite the fact Dr. Lane had precisely so testified (R. 43). Secondly after Appellees' counsel stressed vigorously to the Deputy Commissioner the importance of not admitting hospital records with frequently illegible entries after Dr. Lane had testified and left the stand (R. 46-47), and obtaining a favorable ruling to that effect (R. 48), the Deputy Commissioner summarily reversed his position at the termination of the hearing (R. 106). Again, in interrogating the Claimant as to the subsequent groin injury and operation, Appellees' counsel was hemmed in on the grounds that counsel is defending the vessel in the Third Party damage suit (R. 78-93). Again, despite the importance of determining the pattern of numbness in the Claimant's right leg to demonstrate that he had actually worked from 1962 to 1966 and that the numbness had not increased thereafter, apart from the 1965 injury, both the Deputy Commissioner and Claimant's counsel choked off such inquiry (R. 97-100).

The test of the Administrative Procedure Act calls for a full and true disclosure of the facts. To the extent that cross examination is necessary to bring out the truth, a party must have it.[51] Such a test was not met.

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51. Excerpts from Senate Doc. 248.

The Deputy Commissioner's findings evidence a further continuation of the same lack of objectivity and fair play. The compensation order is set forth in the Record (R. 145) and an analysis of certain of the controlling findings with record references is set forth in Appendix D.

This case is an example of an overzealous administive agency deliberately substituting its own standards in place of those expressly set forth by Congress and of a Circuit Court giving its stamp of approval to such unwarranted action by adhering to an "administrative-judicial system" policy test in order to justify its failure to review the entire record as it is obligated to do. The presence of a complex society whose legislators have created a host of administrative agencies is no excuse for ignoring the system of judicial review which the Administrative Procedure Act compels. The standard pronounced in *Universal Camera* has not been met, and the Fifth Circuit has failed to heed the clear and definitive standard that a Court must follow in reviewing such an award as pronounced by this Court in its decisions.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 24,249

YOUNG & COMPANY and TEXAS EMPLOYEES INSURANCE ASSOCIATION,

Appellants,

versus

R. J. SHEA, Deputy Commissioner of Labor, ET AL.,

Appellees.

No. 25,007

BERTRAM A. WATSON and R. J. SHEA, Deputy Commissioner,

Appellants,

versus

GULF STEVEDORE CORPORATION, ET AL.,

Appellees.

Appeals from the United States District Court for the Southern District of Texas

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(December 9, 1968)

ON JOINT PETITION FOR REHEARING EN BANC

Before JONES, WISDOM and THORNBERRY, Circuit Judges, as to Young & Company and Texas Em-

ployers Insurance Association v. R. J. Shea, Deputy Commissioner of Labor, et al.

Before COLEMAN and GODBOLD, Circuit Judges, and RUBIN, District Judge, as to Bertram W. Watson and R. J. Shea, Deputy Commissioner v. Gulf Stevedore Corporation, et al.

JOINT PER CURIAM: The Petition for Rehearing en banc filed in both of these cases is DENIED, and no member of the panel nor judge in active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are DENIED.

However, because of the assertion of counsel that "the opinions in these two cases are directly in conflict" and are both contrary to the decision of another panel of this circuit in *Goins v. Noble Drilling Corporation*, 5 Cir., ____ F.2d ____, (No. 24,928, July 10, 1968) we consider it appropriate to add a few words to prevent others from drawing the same erroneous conclusions.

Watson and *Goins* involved the same issue: the scope of judicial review of the Deputy Commissioners findings of fact under the Longshoremen's and Harbor Workers' Compensation Act. In both cases an identical standard was applied. In *Goins* it was stated as follows: " '[T]he findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole.' " *J. P. Goins v. Noble Drilling Corporation*, 5 Cir., ____ F.2d ____, (No. 24,928 at page 5, slip opinion). In *Watson*, the criterion was put in almost the same words: "The settled formula is that the decision of the administrative agency should be accepted unless there is no substantial

evidence on the record as a whole to support it." *Watson v. Gulf Stevedore Corp.*, 5 Cir., No. 25,007, at page 3, slip opinion. The sole difference between these cases is that in *Goins* the record lacked substantial evidence to support the findings of the Deputy Commissioner while in *Watson* the evidence was presented and it was substantial.

The scope of judicial review of the Deputy Commissioner's findings under the Longshoremen's and Harbor Workers' Act was repeatedly held, prior to the adoption of the Administrative Procedure Act, to be the same as the later one set forth as a general standard in the A.P.A.[1] See, for example, our 1943 opinion in *Luckenbach Gulf S.S. Co. v. Henderson*, 133 F.2d 305 and such decisions of other courts as *Voehl v. Indemnity Ins. Co.*, 1933, 288 U.S. 162, 53 S.Ct. 380; *Lowe v. Central R. Co. of New Jersey*, 1940, 3 Cir. 113 F.2d 413. And this was the standard applied by the United States Supreme Court in a case to which the prior law was applicable even though it was decided after adoption of the Administrative Procedure Act. *Cardillo v. Liberty Mut. Ins. Co.*, 1947, 330 U.S. 469, 67 S.Ct. 801.

Hence, as we have previously said, the Administrative Procedure Act did not change the scope of judicial review of the Deputy Commissioners findings. The substantial evidence rule, properly applied, as we think it was in *Watson* as well as in *Goins*, fully effects the intention of Congress and amply safeguards the rights of litigants.

In *Young* the issue was entirely different: the question was whether the injured worker was precluded from recovery before the Commissioner by a collateral estoppel re-

[1]Administrative Procedure Act §10(e), 60 Stat. 237 (1946), 5 U.S. C.A. §1001 et seq. (1946).

sulting from an earlier jury determination adverse to him. Concluding that the doctrine of collateral estoppel was inapplicable, the opinion in *Young* set forth expressly several reasons for this result. One of these was, "The standard of persuasion is less before the Commissioner than before the court." *Young & Co. v. Shea,* 5 Cir., No. 24,249 at page 8, slip opinion. This distinguishes the amount of evidence necessary to persuade the Commissioner under the Act from that required to persuade a jury. Nothing said there intimates any modification of the substantial evidence rule this Court has consistently applied to the question of whether the Commissoner's determination should be accepted on review.

In reviewing a decision of the Commissioner and in applying the substantial evidence rule, the reviewing court must take into account that the standard of persuasion is less before the Commissioner than it would be in a jury trial of the same issue. This is because Congress has indicated an intention to require less.[2] The policy of the Act that all doubtful questions are to be resolved in favor of the longshoreman is to be considered in determining whether there was substantial evidence before the Commissioner.[3] Having taken this into account, the reviewing court applies the same rule to *review* of administrative proceedings that an appellate court applies to review of jury verdicts, and, in this respect, as we said in *Watson,* the *scope of review* of jury verdicts and of administrative findings is the same. It is a non sequitur to suggest that the same standards must apply to determine the burden of persuasion before the trier of fact as those applicable when an appellate court reviews the record.

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[2]33 U.S.C. §901 et seq.

[3]See the cases cited in Young & Co. v. Shea, 5 Cir., No. 24,249 at page 7, slip opinion.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 25,007

BERTRAM A. WATSON and R. J. SHEA, Deputy Commissioner,

Appellants,

versus

GULF STEVEDODE CORPORATION, ET AL.,

Appellees.

Appeals from the United States District Court for the Southern District of Texas.

(June 28, 1968.)

Before COLEMAN and GODBOLD, Circuit Judges, and RUBIN, District Judge.

RUBIN, District Judge: In the breast of the litigant who has suffered an adverse factual decision by an administrative body, hope springs eternal that he can persuade a reviewing court to overrule it. Here the hope has found fulfillment and the employer of Watson, an injured longshoreman, has persuaded an ex-

perienced and able trial judge to overturn a determination by the deputy commissioner under the Longshoremen's and Harbor Worker's Compensation Act that Watson suffers permanent total disability. The employee in turn seeks reversal of the district judge's decision.

It is uncontested that at the time of the hearing Watson was disabled and that his disability was then total within the concept of the Act. But since the undisputed medical testimony indicates that Watson is likely to be able to return to work, the employer says his disability is not permanent,[1] and the District Judge found not only that his condition is a temporary one but also that there is no substantial evidence on the record as a whole to support a contrary conclusion.

No one can doubt that an adequate system of judicial review is essential to proper functioning of an administrative system. But in a complex society whose legislators have seen fit to create a host of administrative agencies functioning throughout the economy, the administrative-judicial system would defeat its own purpose and break down of its own weight if every decision were reviewed de novo. Reviewing courts see no witnesses. They try a case on a cold record. They know that judges do not always agree among themselves. They recognize that in human affairs rational men may differ and that the final answer is merely the last and not always the best one.

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1. The difference is important. Section 14(m) of the Act limits the employer's liability to $24,000 for any one "injury," but that limit is inapplicable to an injury resulting in permanent total disability. Section 14(m), 33 U.S.C.A. §914(m) (1961). Watson has been paid all the benefits that he is due under the Act if his disability is temporary and total. If his disability is adjudged to be permanent, he is entitled to additional benefits "during the continuance of such total disability." Section 8, 33 U.S.C.A. §908(a).

Moreover, judges may lack the expertise that is attributed to administrative tribunals. Both legislators and courts agree therefore that, if administrative bodies are to serve their most useful function, they must not be restricted to the role of examiners who merely hear the evidence and reach a conclusion that is only tentative until it is approved or rejected by a court. Hence, both statute[2] and court decision have established the principle that the reviewing court should not substitute its own judgment for the factual determinations of the administrative agency. The settled formula is that the decision of the administrative agency should be accepted unless there is no substantial evidence on the record as a whole to support it.[3]

This formula is not like a standard of weights and measures. We cannot put a yardstick beside the deputy commissioner's decision and ease the judicial task by seeing only whether the evidence was an inch too short. Instead we must examine the decision in the light of the record, with reason as its measure.

"Our reasoning begins with the basic proposition that the Longshoremen's and Harbor Workers' Compensation Act is to be liberally construed in favor of the injured employee. Voris v. Eikel, 1953, 346 U.S. 328, 74 S.Ct. 88, 98 L.Ed. 5; Pillsbury v. United Engineering Co., 1952, 342 U.S. 197, 72 S.Ct. 223, 96 L.Ed. 225."

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2. 5 U.S.C.A. §551 et seq.

3. As Judge Connally correctly states, "The award is to be set aside only if unsupported by substantial evidence upon review of the entire record. [O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951); Strachan Shipping Co. v. Calbeck, 190 F. Supp. 255 (S.D. Tex. 1961) and cases there cited.]" See also the cases cited in the body of this opinion.

McClendon v. Charente Steamship Company, 5 Cir., 1965, 348 F.2d 298, 301.[4]

The Longshoremen's and Harbor Workers' Compensation Act[5] provides for the filing of a "claim for compensation." "[T]he deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim."[6] The Act provides that a compensation order may be set aside "if not in accordance with law."[7] This statutory provision implies that when a court reverses an administrative determination under the Act "the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law." *Cardillo v. Liberty Mutual Insurance Company*, 1947, 330 U.S. 469, 478, 67 S.Ct. 801, 91 L.Ed. 1028. The *Cardillo* opinion pointed out that, in administering the Act, the deputy commissioner must necessarily draw inferences. The scope of judicial review of his inferences is "sharply limited."

Although *Cardillo* dealt with determination of whether a particular injury arose out of and in the course of

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4. See also Reed v. S.S. Yaka, 1963, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448; Delta Steamship Lines, Inc. v. Donovan, 5 Cir., 1966, 356 F.2d 940; O'Keeffe v. Atlantic Stevedoring Company, 1965, 354 F.2d 48; Calbeck v. A.D. Suderman Stevedoring Co., 5 Cir., 1961, 290 F.2d 303; Mississippi Shipping Company, Inc. v. Henderson, 5 Cir., 1956, 231 F.2d 457; Delta Stevedoring Co. v. Henderson, 5 Cir., 1948, 168 F.2d 872; Henderson v. Pate Stevedoring Co., 5 Cir., 1943, 134 F.2d 440. *Cf.* Southern Stevedoring Co. v. Voris, 5 Cir., 1951, 190 F.2d 275, in which the findings were based on evidence that was held inadmissible.

5. 33 U.S.C.A. §901 et seq.

6. Section 19(a), 33 U.S.C.A. §919(a).

7. Section 21(a), 18 U.S.C.A. §921(b).

employment, it states clearly the principles to be followed in connection with judicial review of administrative decisions under the Act. If supported by evidence, and not inconsistent with the law, the deputy commissioner's inference is "conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable." *Id.* at 330 U.S. 477-78.

It has therefore been held repeatedly that, if the deputy commissioner's findings as to the extent of the disability suffered by an injured worker are supported by substantial evidence, his conclusions are final. *Southern Stevedoring Co., Inc. v. Henderson,* 5 Cir., 1949, 175 F.2d 863; *Godfrey v. Henderson,* 5 Cir., 1955, 222 F.2d 845; see also *Walsh Stevedoring Co. v. Henderson,* 5 Cir., 1953, 203 F.2d 501. What is substantial evidence in this sense was defined by the Supreme Court even before adoption of the Administrative Procedure Act. It is evidence that affords "a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *N.L.R.B v. Columbian Enameling and Stamping Co.,* 1939, 306 U.S. 292, 299-300, 59 S.Ct. 501, 83 L.Ed. 660. In sum, the "scope of review of jury verdicts and of administrative findings is the same. . . ." 4 Davis, Administrative Law Treatise §29.02, p. 120.[8] Consequently, since "find-

8. See, e.g., Consolo v. Federal Maritime Commission, 1966, 383 U.S. 607, 620, 86 S.Ct. 1018, 16 L.Ed.2d 131; Peoples Bank of Trenton v. Saxon, 6 Cir., 1967, 373 F.2d 185, 189.

ings may be clearly erroneous without being unreasonable so as to be upset under the substantial-evidence rule, the scope of review of administrative findings is narrower than the scope of review of [the findings of a judge sitting without a jury]." *Id.*, p. 121.[9]

The scope of judicial review of administrative decisions under the Longshoremen's and Harbor Workers' Act has not changed as a result of adoption of the Administrative Procedure Act.[10] *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 1965, 380 U.S. 359, 85 S.Ct. 1012, 13 L.Ed.2d 895. Inferences drawn by the deputy commissioner are to be accepted "unless they are irrational or 'unsupported by substantial evidence on the record . . . as a whole.' " *Id.*, 380 U.S. at 362, 85 S.Ct. at 1014, 13 L.Ed.2d at 898, citing *O'Leary v. Brown-Pacific-Maxon, Inc.*, 1951, 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483.

The evidence before the deputy commissioner showed that Watson suffered an injury to his left leg on February 6, 1961. He underwent a series of operations and other procedures in an effort to avoid amputation of the leg. These were unsuccessful and the leg was amputated below the knee in 1962. He was fitted with a prosthesis and returned to work November 21, 1962. He worked regularly thereafter until August, 1965, when he was hurt in another accident. He had recovered from that injury by April 7, 1966; but in April, 1966, he developed a "small ulcer" on the head of the stump on his left

9. See NLRB v. Southland Mfg. Co., 4 Cir., 1952, 201 F.2d 244, 246; *cf.* United States v. United States Gypsum Co., 1948, 333 U.S. 364, 394-395, 68 S.Ct. 525, 92 L.Ed. 746; District of Columbia v. Pace, 1944, 320 U.S. 698, 701-702, 64 S.Ct. 406, 88 L.Ed. 408.

10. 60 Stat. 237, as amended, 5 U.S.C.A. §1001 et seq., now 5 U.S.C.A. §551 et seq.

leg, resulting from the pressure of the use of the prosthesis. This ulcer was excised. However, at the time of the hearing Watson was still unable to use his prosthesis, and he had to use crutches to get about.

Watson claims he suffers from cramps or aches in his right leg(from which a graft was taken in an effort to avoid amputation of his left leg). The doctors can find no functional disability in his right leg, and attribute any discomfort he may be having to the fact that he is now using crutches and putting all his weight on his right foot.

In sum, the medical evidence with respect to Watson's left leg is that it is likely that his prosthesis can be adjusted to enable him to wear it again. If not, another operation can be performed to provide an additional skin flap and thus enable him to wear the artificial limb. Problems of this nature are apt to recur but it is "reasonably and medically probable" that Watson can be rehabilitated to the extent that he will be able again fully to use his prosthesis. The doctors are unable to say with certainty when this will be accomplished.

Watson has an eighth grade education. He is approximately 46 years old. His only occupational skill is as a longshoreman. He has more than 25 years seniority in this occupation, however, and, when he was able to use his prosthesis, he managed by virtue of his seniority to get supervisory type assignments requiring a minimum of walking or other physical efforts.

In determining what is permanent total disability under the Act, the degree of disability "cannot be measured by physical condition alone. Other factors must be considered, such as age, education, industrial history and

the availability of work which [the injured worker] can do." *Cunnyngham v. Donovan,* 5 Cir., 1964, 328 F.2d 694, 697. Hence, as the court found in that case, the loss of one leg and the loss of thirty-five per cent use of the other amounts to permanent and total disability within the meaning of the Act. "The concept of 'total disability' is economic as well as medical." *Quick v. Martin,* D.C. Cir., 1968, ... F.2d . . . . [No. 20,925, February 27, 1968].[11]

At the time the deputy commissioner heard this case, Watson was unable to use his artificial limb. He was able to walk only with the assistance of a a crutch. Considering Watson's age, education, and skills, there was substantial evidence on the basis of which the deputy commissioner might conclude that Watson was totally disabled without requiring proof that he had sought to secure or perform other kinds of work. Indeed, the employer does not suggest that Watson was able to hold another job at that time. What the employer contends is that the doctors think that Watson will sooner or later be successfully treated and that he will then be able to use his artificial leg and to return to supervisory work in the docks.

The Longshoremen's and Harbor Workers' Act does not define the term "permanent, total disability," nor have the courts set forth standards for determination of when this condition exists under the Act. However, these words have been used in many state compensation statutes. As there

11. See Eastern S.S. Lines v. Monahan, 1 Cir., 1940, 110 F.2d 840; Employers Liability Assurance Corp. v. Hughes, S.D.N.Y., 1959, 188 F. Supp. 623 (Weinfeld, J.); *cf.* McGaughy v. Gardner, E.D. La., 1967, 264 F. Supp. 820; Alsobrooks v. Gardner, 5 Cir., 1966, 357 F.2d 110, for an analogous approach in determining disability under the Social Security Act.

used, the term "permanent" has been held not to mean eternal or everlasting, but merely that the disability is lasting or continuous as distinguished from temporary, or that it will be long continued.[12]

We think that a similar interpretation of the Longshoremen's and Harbor Workers' Act is correct. That Act itself contemplates that disability "adjudged to be permanent" may cease because it provides in express terms that payments for such disability shall be made "during the continuance of such total disability." It can be urged that this phrase is limited in its application to the condition of an employee wh is thought by the medical testimony to be incurable but who later nonetheless recovers. In a statute designed to benefit injured employees and intended to be read liberally in their behalf, it is an equally fair, and, we think, a better construction to find in this phrase an intention to consider an employee permanently disabled when his condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.

The deputy commissioner's determination that an employee is disabled need not depend upon medical testimony alone, and the deputy commissioner may reach this conclusion on the basis of lay testimony. See *Todd Shipyards Corporation v. Donovan,* 5 Cir., 1962, 300 F.2d 741, 742; *Independent Stevedore Company v. O'Leary,* 9 Cir., 1966, 357 F.2d 812, 814. Similarly, the determination that a disability is temporary rather than perma-

12. Meznarich v. Republic Coal Co., 1935, 101 Mont. 78, 53 P.2d 82, 86; see Logston v. Industrial Commission, 1944, 143 Ohio St. 508, 57 N.E.2d 75, 78; Sykes v. Republic Coal Co., Mont., 1933, 22 P.2d 157, 160.

nent need not be reached merely because the medical prognosis is that the employee is likely at some indefinite future date to get better and to be able to return to work. The statute neither requires that a longshoreman be bedridden before he is considered totally disabled nor that he be pronounced medically incurable before his condition is permanent.

There are neither categorical imperatives nor hard and fast rules in the statute, and we intend to create none by this decision. The question of whether a disability is permanent is left by the Act for the deputy commissioner's determination, limited of course by the substantial evidence standard. The deputy commissioner is authorized to weigh the evidence and to draw inferences from it. "Indeed, this type of determination," as the Supreme Court observed in another connection,[13] "would seem to be one particularly for the Deputy Commissioner."

The determination that Watson is permanently disabled does not foreclose the possibility that his condition may change. If Watson's condition improves so that he is again able to use his prosthesis and work on the docks, or elsewhere, in some job that he is physically able to hold, his disability may have ceased to be permanent and the employer may then have his condition reviewed under the procedure set forth in 33 U.S.C.A. §922.[14] See *Godfrey v. Henderson,* 5 Cir., 1955, 222 F.2d 845.

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13. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 1965, 380 U.S. 359, 364, 85 S.Ct. 1012, 13 L.Ed.2d 895.

14. "Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after

We hold that there is substantial evidence to support the deputy commissioner's conclusion that Watson's disability was both permanent and total within the concept of the statute. The mere fact that a district court might reach another conclusion on the same evidence had the statute given it the authority it gives the deputy commissioner does not justify setting the deputy commissioner's determination aside. Hence, the judgment of the district court must be

REVERSED.

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the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure presented in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation." 33 U.S.C.A. §922.

APPENDIX C

[139]

DISTRICT COURT'S MEMORANDUM OPINION

(Caption Omitted)

(Filed May 2, 1967)

Royston, Rayzor & Cook (Carl O. Bue, Jr., Esq.), Houston, Texas, attorney for Plaintiffs.

Morton L. Susman, Esq., United States Attorney, and Jack Shepherd, Esq., Assistant United States Attorney, Houston, Texas, attorney for Defendant Shea.

W. Jiles Roberts, Esq., Houston, Texas, Attorney for Defendant Watson.

May 2, 1967

MEMORANDUM:

In this action the employer (Gulf Stevedore Corporation) and its insurer (Texas Employers' Insurance Association) seek to have this court review and set aside as not in accordance with law a compensation order filed [140] before Deputy Commissioner Shea (the Eighth Compensation District) entered December 8, 1966, pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§901 et seq. In the questioned order, the Commissioner found that Bertram A. Watson, the longshoreman-claimant, was totally and per-

manently disabled as result of an injury which he received February 6, 1957.

The review of this award under the cited statute is as fixed by the Administrative Procedure Act, 5 U.S.C.A. §1009. The award is to be set aside only if unsupported by substantial evidence upon review of the entire record. [*O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951); *Strachan Shipping Co. v. Calbeck*, 190 F.Supp. 255 (S.D. Tex. 1961) and cases there cited.]

The basic facts are essentially undisputed. They are as follows.

Three distinct injuries are directly or indirectly involved. The earliest in point of time is an injury suffered by the claimant to his right shoulder in 1953. The injury was of a serious nature. As result thereof, he made claim under the Texas Workmen's Compensation Act, alleging [141] permanent disability. After disposition of the pending litigation, the claimant returned to his regular duties and apparently suffered little, if any, disability to the affected shoulder thereafter. At the time of the hearing here in question, he was found to have no disability in the shoulder.

The injury of primary concern occurred February 6, 1957, when claimant received a crushing of his left lower extremity below the knee. A series of operations and other procedures over an extended period were had in an unsuccessful effort to avoid amputation. Amputation below the knee became necessary, and was performed in 1962. Thereafter he was fitted with a prosthesis and returned to work November 21, 1962. He worked regularly thereafter until April 7, 1966, except for a period of disability caused by the third injury.

The third injury occurred in August of 1965 when the claimant suffered a fall and a resulting injury to the groin area. He presently has pending in this court a third party action wherein he contends that he suffered heavy money damages as result of disability resulting from this injury. The Commissioner has found that neither the injury [142] in 1953 nor that in 1965 contributed in any way to the claimant's present disability. There is ample support in the evidence therefor.

Claimant's inability to work in April 1966 was the direct result of a small ulcer which developed on the head of the stump of his left leg, resulting from the pressure of use of the prosthesis. This ulcer was excised. The condition of the surface of the stump presently is much improved. Ulceration of this character is quite common in cases of amputation, and may recur.

One of the surgical procedures followed in an attempt to avoid the amputation was a skin graft. Certain skin and tissue was taken from claimant's right, or donor, leg and grafted upon his left leg. The claimant has testified that he suffers certain cramping or aching in the right leg which he feels has worsened in recent months.

Two medical witnesses were offered, Dr. George H. Lane, an orthopedic surgeon who had treated claimant since the injury of 1957, and Dr. Sidney Barron Hardy (by deposition), a specialist in plastic and reconstructive surgery. The physicians testified, in summary, that the [143] real source of claimant's difficulty now was the ulcer which had been excised from the stump of the left leg; that when the surface of the stump was sufficiently healed to permit the use of the prosthesis that his condition would be essentially the same as it had been since

the amputation in 1962; that a definite program of treatment was in progress for this area and that the physicians had every reason to believe their efforts would be successful; that such difficulties were quite common in similar cases, but that usually when the prosthesis was properly fitted it could be worn and used without great difficulty. As to the conditions of the right leg of which the claimant complained, it was the testimony of the doctors that this was not unusual. It was attributed to the fact that the right leg had been used more than it normally would by reason of the fact that the claimant had been on crutches and without benefit of his prosthesis for several months. The right leg was not shown to have any functional disability, although the removal of the skin and tissue was calculated to, and did, result in the loss of some sensitivity, and resulting numbness at the affected site.

[144] The controversy here is this. In the light of such a factual background, is the finding of the Commissioner that the claimant is totally and permanently disabled sustained by substantial evidence. In my judgment, it is not. In Finding No. 7 the Commissioner points out that claimant has been totally disabled since April 1966; that there is a distinct possibility that further plastic surgery will be required. These findings are amply supported. But the conclusion, "Inasmuch as the claimant obviously is totally disabled at this time and since April of 1966, it would be speculation on the part of the Deputy Commissioner to hold this condition not to be permanent" is completely unwarranted. The record as a whole shows that the present condition which has rendered claimant unable to work is a temporary one which the physicians fully expect to correct. Granted that this or some similar difficulty may

recur, in the great majority of cases remedies and cures are found.

As noted, claimant worked regularly as a longshoreman from 1962 until April 1966. It is undisputed that during this interval he received favored treatment at the hands of the employer and of his associates. He was assigned to supervisory-type work requiring a minimum of walking or [145] other physical effort. By reason of his seniority, in excess of 25 years on the docks, he was entitled to such consideration, although he has testified that he was unable fully and adequately to perform even these lighter duties. The claimant is 45 years of age. He has an eighth grade education and has some prior experience as a cook and as a dragline operator. The Commissioner finds that he cannot return to regular work as a longshoreman and that he cannot engage in unrestricted manual labor for any sustained period of time. These findings find support in the evidence. But the further finding that claimant "cannot pass a pre-employment medical examination", in my judgment, is not warranted. The physician suggested a number of lines of work which claimant might follow. The fact that he may no longer perform the most arduous types of physical labor does not mean that he is totally and permanently disabled. The Act defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury *in the same or any other employment.*" [Sec. 2(10)] (Emphasis added.) [146] He has never sought to secure, or perform, any work except longshore work since his injury. It is rank speculation to hold he cannot, without at least an effort.

The award of the Deputy Commissioner will be enjoined and set aside. Clerk will furnish counsel a copy hereof. Counsel will prepare and submit an appropriate decree.

Done at Houston, Texas this 2nd day of May, 1967.

BEN C. CONNALLY
United States District Judge

APPENDIX D

ANALYSIS OF CONTROLLING FINDINGS of DEPUTY COMMISIONER CONTAINED IN AWARD

A. *Finding of Fact No. 5.* (R. 147)

This Finding of Fact pertains to osteomyelitis concerning which Dr. Lane testified at length. While conceding that "for all practical purposes testimony shows the Claimant no longer has osteomyelitis in his system because the site of the disease has been amputated", the Deputy Commissioner completely disregards the testimony of Dr. Lane to the effect that he doesn't think there is any room for possibility that osteomyelitis remains in the Claimant's system. Dr. Lane completely excluded the possibility of osteomyelitis being dormant within Watson's system. (R. 34-36). Dr. Hardy concurred. (R. 123).

B. *Finding of Fact No. 6.* (R. 147)

This pertains to the ulcer on the head of the stump of the left leg which developed from the pressure of the prosthesis. The Claimant-Watson testified that the reason for his being off work after April 7, 1966 was because he developed a hole in his amputation and had to see Dr. Lane who operated on him. (R. 13-14). Dr. Lane's relevant testimony is found in the Record on pages 34-40. The infection was superficial, and Dr. Lane expressed the opinion that most amputees do experience similar ulcers which is anything but unusual for an amputee.

C. *Finding of Fact No. 7* (R. 147)

This finding pertains to the Claimant's condition since April, 1966 when a condition of the stump caused him

to discontinue wearing a prosthesis on the left leg. Whatever the condition of the stump of the left leg, it is only too apparent that both Dr. Lane and Dr. Hardy had formulated plans for handling the situation, no matter what turn of events materializes. (R. 42-43). Under such a state of medical facts, it is astonishing for the Deputy Commissioner to conclude that "it would be speculation on the part of the Deputy Commissioner to hold his condition not to be permanent". Actually it would be speculation for him to conclude anything else but that it was a temporary situation, particularly in the light of the Claimant's work record.

D. *Finding of Fact No. 8* (R. 148)

It is recited that "Dr. Lane also testified that this case is complicated beyond the extent of most amputees' conditions. The Claimant has more problems than the usual amputee by reason of having had cross leg graft." This is a misleading recitation of the testimony. Although not all amputees require skin graft, it does not follow that one who does necessarily has a complicated case. As a matter of fact, Dr. Lane testified that Mr. Watson's problem is probably the commonest problem that we see with respect to below knee amputation. (R. 43). Amputees develop problems through the years, and all of the problems have to be solved by one means or another. (R. 43). Despite the fact that Dr. Lane actually did testify that all amputees have some problems (R. 43), the objections of counsel were sustained by the Deputy Commissioner. (R. 50-52). Eventually Dr. Lane was permitted to testify that many amputees have problems similar to those of Mr. Watson. (R. 52). Dr. Lane then testified that he viewed Watson's situation relative to the skin condition of the stump, the fit of the prosthesis and the prognosis

of rehabilitation so that he can fully use the prosthesis as being reasonably and medically probable. (R. 51).

With reference to the right leg, the record certainly does not support the Deputy Commissioner in his Finding that "the Claimant has sustained significant disability to the right or remaining leg." Orthopedically, Dr. Lane testified that there was no disability in the bones, joints or of the muscles. (R. 45). There is no abnormality in the way Watson uses the right leg. (R. 45). These observations acquire additional significance when it is recalled that Dr. Lane had observed, examined and operated upon this longshoreman since his accident in 1957. The reason Watson could go back to longshoring is because of the stump of the left leg, not because of the condition of one or both legs as suggested by counsel for Watson. (R. 46). Dr. Lane has no knowledge of any functional disability to the right leg. (R. 48). Dr. Hardy testified that the right leg suffered no functional loss as a result of the skin graft. (R. 116, 131, 134). Only sensory nerves were severed, no functional structures, (R. 124), and there was no interference with muscle action (R. 131) or with muscle substance (R. 133). Like a person with varicose veins, Watson was told to wear an elastic support (R. 125). No functioning mass was removed at all, only a mass of skin (R. 138).

E. *Finding of Fact No. 9.* (R. 148)

This is the Claimant's version of what he did at the waterfront. Reference to the weekly earnings of Watson (Appendix Exhibit A) reflect what he earned before and after the accident. As a gold star button holder, it is highly unlikely that he or anyone with similar seniority would seek other than the key or easy jobs.

F. *Findings of Fact Nos. 10, 11, 12.* (R. 148-149)

These may be discussed together. The Deputy Commissioner in Finding of Fact No. 11 concluded that "it is well established from a medical standpoint that the Claimant cannot pass a pre-employment physical examination on the open labor market for work that requires even moderate physical exertion, such as prolonged walking or climbing." Nothing of the sort has been established, and certainly Dr. Lane and Dr. Hardy have never given up on Watson who actually worked at the docks with a prosthesis from October of 1962 to August of 1965 when he had his groin injury. There is no evidence to support such a "well established fact," nor is there any basis on which the Deputy Commissioner could take judicial notice of such a proposition.

Whatever temporary disability exists as to the stump of the left leg of Bertram Watson, it is a condition which can resolve itself, according to the medical testimony, either with or without further operative procedures. It is incomprehensible how the Deputy Commissioner objectively can conclude on a record such as this one that Watson is a total and permanent case. There is every hope that he can return to longshore work in a supervisory capacity or other types of employment. (R. 52-53). Watson himself testified that he has done work on small motors and that he planned to find whatever work he could do. (R. 102-104). The opinions of Dr. Lane and Dr. Hardy and the representations of Watson hardly characterize him as one who cannot find any place whatsoever on the open labor market. To the contrary, this is a record of a longshoreman who is temporarily disabled as a result of an ulcer on his left stump without any functional involvement of his right leg.

APPENDIX E

WEEKLY WAGES OF BERTRAM A. WATSON
SOCIAL SECURITY NUMBER 476-07-00217
MSAT NO: 1652

Week Ending	Gross Earnings	Week Ending	Gross Earnings
1956		8-28-56	56.07
2-13-56	18.80	9- 4-56	164.43
2-20-56	103.26	9-11-56	185.45
2-27-56	154.51	9-18-56	-0-
3- 5-56	74.65	9-25-56	101.25
3-12-56	120.96	10- 2-56	102.22
3-19-56	90.64	10- 9-56	87.57
3-26-56	123.11	10-16-56	105.84
4- 3-56	126.21	10-23-56	74,34
4-10-56	198.45	10-30-56	219.24
6-19-56	94.12	11- 6-56	52.92
6-26-56	190.71	11-13-56	208.84
7- 3-56	82.52	11-20-56	83.16
7-10-56	174.13	11-27-56	15.12
7-17-56	168.84	12- 4-56	13.89
7-24-56	-0-	12-11-56	102.66
7-31-56	120.96	12-18-56	146.79
8- 7-56	221.76	12-25-56	82.53
4-17-56	231.21	1957	
4-24-56	74.34	1- 1-57	211.28
5- 1-56	102.83	1- 8-57	174.44
5- 8-56	39.70	1-15-57	-0-
5-15-56	74.33	1-22-57	234.99
5-22-56	83.59	1-29-57	163.11
5-29-56	171.61	2- 6-57	63.00
6- 5-56	209.60	2-13-57	-0-
6-12-56	23.94	2-20-57	-0-
8-14-56	250.74	2-27-57	-0-
8-21-56	-0-	3- 6-57	-0-

Week Ending	Gross Earnings
3-13-57	-0-
3-20-57	-0-
3-27-57	-0-
4- 3-57	-0-
4-10-57	-0-
4-17-57	-0-
4-24-57	-0-
5- 1-57	-0-
5- 8-57	-0-
5-15-57	-0-
5-22-57	-0-
5-29-57	-0-
6- 5-57	-0-
6-12-57	-0-
6-19-57	-0-
6-26-57	-0-
7- 3-57	-0-
7-10-57	-0-
7-17-57	-0-
7-24-57	-0-
7-31-57	-0-
8- 7-57	-0-
8-14-57	-0-
8-21-57	-0-
8-28-57	-0-
9- 4-57	-0-
9-11-57	-0-
9-18-57	-0-
9-25-57	-0-
10- 2-57	-0-
10- 9-57	-0-
10-16-57	-0-
10-23-57	-0-
10-30-57	-0-
11- 6-57	-0-
11-13-57	-0-
11-20-57	-0-
11-27-57	-0-
12- 4-57	-0-
12-11-57	-0-
12-18-57	-0-
12-25-57	-0-
1958	
1- 1-58	-0-
1- 8-58	-0-
1-15-58	-0-
1-22-58	-0-
1-29-58	-0-
2- 5-58	-0-
2-12-58	-0-
2-19-58	-0-
2-26-58	-0-
3- 5-58	-0-
3-12-58	-0-
3-19-58	-0-
3-26-58	-0-
4- 2-58	-0-
4- 9-58	-0-
4-16-58	-0-
4-23-58	-0-
4-30-58	-0-
5- 7-58	-0-
5-14-58	-0-
5-21-58	-0-
5-28-58	-0-
6- 2-58	-0-
6- 9-58	-0-
6-16-58	-0-
6-23-58	-0-
6-30-58	-0-
7- 7-58	-0-
7-14-58	-0-
7-21-58	-0-
7-28-58	-0-

Week Ending	Gross Earnings
8- 4-58	-0-
8-11-58	-0-
8-18-58	-0-
8-25-58	-0-
9- 1-58	-0-
9- 8-58	-0-
9-15-58	-0-
9-22-58	-0-
9-29-58	-0-
10- 6-58	-0-
10-13-58	-0-
10-20-58	-0-
10-27-58	-0-
11- 3-58	-0-
11-10-58	-0-
11-17-58	-0-
11-24-58	-0-
12- 1-58	-0-
12- 8-58	-0-
12-15-58	-0-
12-22-58	-0-
12-29-58	-0-
1959	
1- 5-59	-0-
1-12-59	-0-
1-19-59	-0-
1-26-59	-0-
2- 2-59	-0-
2- 9-59	-0-
2-16-59	-0-
2-23-59	-0-
3- 2-59	-0-
3- 9-59	-0-
3-16-59	-0-
3-23-59	-0-
3-30-59	-0-
4- 6-59	-0-
4-13-59	-0-
4-20-59	-0-
4-27-59	-0-
5- 4-59	-0-
5-11-59	-0-
5-18-59	-0-
5-25-59	-0-
6- 1-59	-0-
6-22-59	-0-
6-29-59	-0-
7- 6-59	-0-
7-13-59	-0-
7-20-59	-0-
7-27-59	-0-
8- 3-59	-0-
8-10-59	-0-
8-17-59	-0-
8-24-59	-0-
8-31-59	-0-
9- 7-59	-0-
9-14-59	-0-
9-21-59	-0-
9-28-59	-0-
10- 5-59	-0-
10-12-59	-0-
10-19-59	-0-
10-26-59	-0-
11- 2-59	-0-
11- 9-59	-0-
11-16-59	-0-
11-23-59	-0-
11-30-59	-0-
12- 7-59	-0-
12-14-59	-0-
12-21-59	-0-
12-28-59	-0-

Week Ending	Gross Earnings
1960	
1- 4-60	-0-
1-11-60	-0-
1-18-60	-0-
1-25-60	-0-
2- 1-60	-0-
2- 8-60	-0-
2-15-60	-0-
2-22-59	-0-
2-29-60	-0-
3- 7-60	-0-
3-14-60	-0-
3-21-60	-0-
3-28-60	-0-
4- 4-60	-0-
4-11-60	-0-
4-18-60	-0-
4-25-60	-0-
5- 2-60	-0-
5- 9-60	-0-
5-16-60	-0-
5-23-60	-0-
5-30-60	-0-
6- 6-60	-0-
6-13-60	-0-
6-20-60	-0-
6-27-60	-0-
7- 4-60	-0-
7-11-60	-0-
7-18-60	-0-
7-25-60	-0-
8- 1-60	-0-
8- 8-60	-0-
8-15-60	-0-
8-22-60	-0-
8-29-60	-0-
9- 5-60	-0-
9-12-60	-0-
9-19-60	-0-
9-26-60	-0-
10- 3-60	-0-
10-10-60	-0-
10-17-60	-0-
10-24-60	24.74
10-31-60	-0-
11- 7-60	-0-
11-14-60	-0-
11-21-60	-0-
11-28-60	8.73
12- 5-60	-0-
12-12-60	-0-
12-19-60	-0-
12-26-60	51.32
1961	
1- 2-61	16.60
1- 9-61	11.64
1-16-61	-0-
1-23-61	-0-
1-30-61	-0-
2- 6-61	23.28
2-13-61	75.79
2-20-61	75.79
2-27-61	84.75
3- 6-61	98.26
3-13-61	96.92
3-20-61	79.36
3-27-61	80.17
4- 3-61	88.10
4-10-61	94.56
4-17-61	85.26
4-24-61	59.73
5- 1-61	79.65
5- 8-61	94.57
5-15-61	76.29

Week Ending	Gross Earnings	Week Ending	Gross Earnings
5-22-61	94.39	1-29-62	-0-
5-29-61	85.10	2- 5-62	-0-
6- 5-61	95.15	2-12-62	-0-
6-21-61	69.10	2-19-62	-0-
6-19-61	96.03	2-26-62	-0-
6-26-61	48.81	3- 5-62	-0-
7- 3-61	73.28	3-12-62	-0-
7-10-61	69.28	3-19-62	-0-
7-17-61	74.03	3-26-62	-0-
7-24-61	81.42	4- 2-62	-0-
7-31-61	106.87	4- 9-62	-0-
8- 7-61	93.12	4-16-62	-0-
8-14-61	94.97	4-23-62	-0-
8-21-61	101.09	4-30-62	-0-
8-28-61	78.55	5- 7-62	-0-
9- 4-61	67.61	5-14-62	-0-
9-11-61	91.72	5-21-62	-0-
9-18-61	43.65	5-28-62	-0-
9-25-61	107.64	6- 4-62	-0-
10- 2-61	75.67	6-11-62	-0-
10- 9-61	104.07	6-18-62	-0-
10-16-61	94.72	6-25-62	13.32
10-23-61	32.51	7- 2-62	-0-
10-30-61	-0-	7- 9-62	-0-
11- 6-61	-0-	7-16-62	-0-
11-13-61	-0-	7-23-62	-0-
11-20-61	-0-	7-30-62	-0-
11-27-61	-0-	8- 6-62	-0-
12- 4-61	-0-	8-13-62	-0-
12-11-61	-0-	8-20-62	-0-
12-18-61	-0-	8-27-62	-0-
12-25-61	-0-	9- 3-62	-0-
1962		9-10-62	-0-
1- 1-62	-0-	9-17-62	-0-
1- 8-62	-0-	9-24-62	-0-
1-15-62	-0-	10- 1-62	-0-
1-22-62	-0-	10- 8-62	-0-

Week Ending	Gross Earnings
10-15-62	31.23
10-22-62	87.32
10-29-62	76.35
11- 5-62	99.24
11-12-62	22.20
11-19-62	135.31
11-26-62	96.90
12- 3-62	137.91
12-10-62	74.97
12-17-62	208.28
12-24-62	126.50
12-31-62	STRIKE
1963	
1- 7-63	STRIKE
1-14-63	STRIKE
1-21-63	STRIKE
1-28-63	-0-
2- 4-63	128.12
2-11-63	135.17
2-18-63	179.67
2-25-63	109.61
3- 4-63	177.77
3-11-63	126.98
3-18-63	93.27
3-25-63	96.42
4- 1-63	192.03
4- 8-63	134.97
4-15-63	86.16
4-22-63	112.21
4-29-63	139.17
5- 6-63	88.36
5-13-63	132.60
5-20-63	103.15
5-27-63	106.68
6- 3-63	91.68
6-10-63	108.55
6-17-63	134.21
6-24-63	77.20
7- 1-63	155.47
Retro Wages	55.15
7- 8-63	173.00
7-15-63	126.12
7-22-63	64.73
7-29-63	104.49
8- 5-63	109.10
8-12-63	-0-
8-19-63	90.08
8-26-63	182.28
9- 2-63	91.64
9- 9-63	85.33
9-16-63	59.07
9-23-63	134.12
9-30-63	140.64
10- 7-63	52.70
10-14-63	160.87
10-21-63	44.55
10-28-63	126.22
11- 4-63	285.45
11-11-63	62.70
11-18-63	91.16
11-25-63	110.97
12- 2-63	127.86
12- 9-63	99.71
12-16-63	188.48
12-23-63	151.82
12-30-63	152.62
1964	
1- 6-64	47.67
1-13-64	103.00
1-20-64	123.68
1-27-64	93.44
2- 3-64	149.35
2-10-64	177.12
2-17-64	161.87

Week Ending	Gross Earnings
2-24-64	54.45
3- 2-64	173.22
3- 9-64	98.59
3-16-64	131.81
3-23-64	97.35
3-30-64	153.43
4- 6-64	180.80
4-13-64	15.00
4-20-64	119.89
4-27-64	201.45
5- 4-64	39.06
5-11-64	169.65
5-18-64	123.22
5-25-64	179.89
6- 1-64	83.44
6- 8-64	164.32
6-15-64	110.55
6-22-64	64.77
6-29-64	135.55
7- 6-64	155.38
7-13-64	123.75
7-20-64	-0-
7-27-64	48.00
8- 3-64	118.40
8-10-64	93.15
8-17-64	126.81
8-24-64	136.00
8-31-64	133.97
9- 7-64	35.65
9-14-64	132.00
9-21-64	95.82
9-28-64	114.15
10- 5-64	85.80
10-12-64	214.40
10-19-64	155.20
10-26-64	110.11
11- 2-64	52.85
11- 9-64	154.20
11-16-64	126.20
11-23-64	131.62
11-30-64	127.26
12- 7-64	165.34
12-14-64	169.74
12-21-64	109.42
12-28-64	49.27
1965	
1- 4-65	142.45
1-11-65	209.43
1-18-65	STRIKE
1-25-65	STRIKE
2- 1-65	STRIKE
2- 8-65	STRIKE
2-15-65	STRIKE
2-22-65	STRIKE
3- 1-65	STRIKE
3- 8-65	49.80
3-15-65	272.92
3-22-65	262.88
3-29-65	233.74
4- 5-65	298.10
4-12-65	190.58
4-19-65	227.66
4-26-65	174.33
5- 3-65	156.29
5-10-65	146.08
5-17-65	136.17
5-24-65	138.70
5-31-65	93.88
6- 7-65	174.30
6-14-65	89.56
6-21-65	137.62
6-28-65	144.82
Retro Wages	70.81
7- 5-65	184.06

Week Ending	Gross Earnings
7-12-65	156.60
7-19-65	111.42
7-26-65	213.84
8- 2-65	148.33
8- 9-65	4.98
8-16-65	-0-
8-23-65	-0-
8-30-65	-0-
9- 6-65	-0-
9-13-65	-0-
9-20-65	-0-
9-27-65	-0-
10- 4-65	-0-
10-11-65	134.23
10-18-65	117.94
10-25-65	152.91
11- 1-65	176.91
11- 8-65	211.72
11-15-65	82.08
11-22-65	135.22
11-29-65	139.01
12- 6-65	63.74
12-13-65	157.71
12-20-65	141.93
12-27-65	180.40
1966	
1- 3-66	154.86
1-10-66	110.06
1-17-66	95.20
1-24-66	88.98
1-31-66	194.09
2- 7-66	96.88
2-14-66	96.33
2-21-66	165.04
2-28-66	130.84
3- 7-66	132.97
3-14-66	173.56
3-21-66	59.39
3-28-66	124.83
4- 4-66	116.83
4-11-66	61.81
4-18-66	-0-
4-25-66	-0-
5- 2-66	-0-
5- 9-66	-0-
5-16-66	-0-
5-23-66	-0-
5-30-66	-0-
6- 6-66	-0-
6-13-66	-0-
6-20-66	-0-
6-27-66	-0-
7- 4-66	-0-
7-11-66	-0-
7-18-66	-0-
7-25-66	-0-
8- 1-66	-0-
8- 8-66	-0-
8-15-66	-0-
8-22-66	-0-
8-29-66	-0-
9- 5-66	13.68
9-12-66	-0-
9-19-66	-0-
9-26-66	-0-
10- 3-66	-0-
10-10-66	-0-
10-17-66	-0-

APPENDIX F

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

Section 908 (a) Permanent total disability: In case of total disability adjudged to be permanent 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

Section 908 (b) Temporary total disability: In case of disability total in character but temporary in quality 66⅔ percentum of the average weekly wages shall be paid to the employee during the continuance thereof.

Section 908 (f) Injury increasing disability: (1) If an employee receive an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury: *Provided, however,* That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the

compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in Section 44.

Section 914 (m) The total money allowance payable to an employee as compensation for an injury under this Act shall in no event exceed in the aggregate the sum of $24,000: Provided, that this limitation shall not apply to cases of permanent total disability or death: And provided further, That in applying this limitation there shall not be taken into account any amount payable under Section 8 (g) for maintenance during rehabilitation or any amount of additional compensation required to be paid under this section for delay or default in the payment of compensation or any amount accruing as interest upon defaulted compensation collectible under Section 18.

Section 922 Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in Section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such com-

pensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary.

Section 31.19 Compepnsation from special fund in cases of permanent disability. In any case in which an employee receives an injury which would of itself cause only permanent partial disability, but which when combined with disability resulting from a previous unrelated injury does in fact cause permanent total disability or disability less than permanent total so that the case would be one within the purview of Section 8 (f) of said act (44 Stat. 1429; 33 U.S. 908(f)) the deputy commissioner shall in a compensation order find separately the facts relating to each injury and shall find the extent of the employee's disability resulting from each injury and shall make an award against the employer only for the results of the subsequent injury. Upon the cessation of payments of compensation for such disability, the case, if one involving permanent total disability, shall be transmitted to the Bureau for consideration of an

award by it out of the special fund established in Section 44 of said act (44 Stat. 1444; 33 U.S.C. 944).

ADMINISTRATIVE PROCEDURE ACT—
5 U.S.C. §556 (d)

". . . the proponent of a rule or order has the burden of proof . . . A sanction may not be imposed . . . or ordered issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in according with the reliable, probative and substantial evidence . . ."

APPENDIX G

EXCERPTS FROM SENATE DOC. 248

Excerpts from pamphlet of the U.S. Government Printing Office Pamphlet — *Administrative Procedure Act — Legislative History*, 79th Congress, 1944-46—Senate Document No. 248.

On Section 7(c) [5 U.S.C.A. #1006 (c)] from the Report of the Senate Committee on the Judiciary at p. 208:

> The second and primary sentence of the subsection is framed on the theory that an administrative hearing is to be compared with an equity proceeding in the courts. The mere admission of evidence is not to be taken as prejudicial error (there being no lay jury to be protected from improper influence) although irrelevant and unduly repetitious evidence is to be excluded as a matter of efficiency and good practice; and no finding or conclusion may be entered except upon evidence which is plainly of the requisite materiality and competence; that is, "relevant, reliable, and probative evidence." Thus while the exclusionary "rules of evidence" do not apply except as the agency may as a matter of good practice simplify the hearing and record by excluding obviously improper or unnecessary evidence, the standards and principles of probity and reliability of evidence must be the same as those prevailing in courts of law or equity in non-administrative cases. There are no real rules of probity and reliability even in courts of law, but there are certain standards and principles—usually applied tacitly and resting mainly upon common sense—which people engaged in the conduct of responsible affairs instinctively understand and act upon. They may vary with the circumstances and kind of case, but they exist and must be rationally applied. These principles, under this subsection, are to govern in administrative proceedings.

EXCERPTS FROM SENATE DOC. 248

The right of cross-examination extends, in a proper case, to written evidence submitted pursuant to the last sentence of the subsection as well as to cases in which oral or documentary evidence is received in open hearing. Even in the latter case subject to the appropriate safeguards, technical data may as a matter of convenience be reduced to writing and introduced as in courts. The written evidence provision of the last sentence of the subsection is designed to cover situations in which, as a matter of general rule or practice, the submission of the whole or substantial portions of the evidence in a case is done in written form. In those situations, however, the provision limits the practice to specified classes of cases and, even then, only where and to the extent that "the interest of any party will not be prejudiced thereby." To the extent that cross-examination is necessary to bring out the truth, the party should have it. Also, an adequate opportunity must be provided for a party to prepare and submit appropriate rebuttal evidence.

From Report of Senate Committee on the Judiciary at p. 216:

The basic provision respecting evidence in section 7(c) [5 U.S.C.A. #1006(c)] that any agency action must be supported by plainly "relevant, reliable, and probative evidence"—will require full compliance by agencies and diligent enforcement by reviewing courts. Should that language prove insufficient to fix and maintain the standards of proof, supplemental legislation will become necessary.

The "substantial evidence" rule set forth in section 10(e) [5 U.S.C.A. #1009(e)] is exceedingly im-

portant. As a matter of language, substantial evidence would seem to be an adequate expression of law. The difficulty comes about in the practice of agencies to rely upon (and of courts to tacitly approve) something less—to rely upon suspicion, surmise, implications, or plainly incredible evidence. It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law. In the first instance, however, it will be the function of the agency to determine the sufficiency of the evidence upon which it acts—and the proper performance of its public duties will require it to undertake this inquiry in a careful and dispassionate manner. Should these objectives of the bill as worded fail, supplemental legislation will be required.

From Report of the Committee on the Judiciary of House of Representatives at p. 270:

The second and primary sentence of the section (Section 7(c) [5 U.S.C.A. #1006(c)] is framed on the premise that, as to the admissibility of evidence, an administrative hearing is to be compared with an equity proceeding in the courts. Thus, the mere admission of evidence is not to be taken as prejudicial error, there being no lay jury to be protected from improper influence) although irrelevant, immaterial, and unduly repetitious evidence is useless and is to be excluded as a matter of efficiency and good practice; and no finding or conclusion may be entered except upon consideration by the agency of the whole record or so much thereof as a party may cite and as supported by and in accordance with evidence which is plainly of the requisite relevance and ma-

teriality—that is, "reliable probative, and substantial evidence." Thus while the exclusionary "rules of evidence" do not apply except as the agency may as a matter of sound practice simplify the hearing and record by excluding improper or unnecessary matter, the accepted standards and principles of probity, reliability, and substantiality of evidence must be applied. These are standards or principles usually applied tacitly and resting mainly upon common sense which people engaged in the conduct of responsible affairs instinctively understand. But they exist and must be rationally applied. They are to govern in administrative proceedings. These requirements do not preclude the admission of or reliance upon technical reports, surveys, analyses, and summaries where appropriate to the subject matter.

The first and second sentences of the section therefore mean that, where a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted. In any case the agency must decide "in accordance with the evidence." Where there is evidence pro and con, the agency must weight it and decide in accordance with the preponderance. In short, these provisions require a conscientious and rational judgment on the whole record in accordance with the proofs adduced. The proof must be substantial, as provided in this section and also in section 10(e) where the term "substantial evidence" is discussed later in this report.

The provision on its face does not confer a right of so-called "un-limited" cross examination. Presiding officers will have to make the necessary initial determination whether the cross-examination is pressed to unreasonable lengths by a party or whether it is required for the "full and true disclosure of the facts"

stated in the provision. Nor is it the intention to eliminate the authority of agencies to confer sound discretion upon presiding officers in the matter of its extent. The test is—as the section states—whether it is required "for a full and true disclosure of the facts." In many rule-making proceedings where the subject matter and evidence are broadly economic or statistical in character and the parties or witnesses numerous, the direct or rebuttal evidence may be of such a nature that cross-examination adds nothing substantial to the record and unnecessarily prolongs the hearings. The right of cross-examination extends, in a proper case, to written evidence submitted pursuant to the last sentence of the section as well as to cases in which oral or documentary evidence is received in open hearing. Even in the latter case, subject to the appropriate safeguards, technical data may as a matter of convenience be reduced to writing and introduced as in courts. Among these are technical statements, reports of surveys, analyses and summaries. The written evidence provision of the last sentence of the section is designed to cover situations in which, as a matter of general rule or practice, the submission of the whole or substantial portions of the evidence in a case is done in written form. In those situations, however, the provision limits the practice to specified classes of cases and, even then, only where and to the extent that "the interest of any party will not be prejudiced thereby." To the extent that cross-examination is necessary to bring out the truth, the party must have it. An adequate opportunity must also be provided for a party to prepare and submit appropriate rebuttal evidence.

Agencies must comply fully and the courts, pursuant to section 10 of the bill, must enforce all of these requirements diligently.

EXCERPTS FROM SENATE DOC. 248

Referring to Section 10(e), [5 U.S.C.A. #1009(e)] from the report of the Committee on the Judiciary of House of Representatives at p. 279:

> "Substantial evidence" means evidence which on the whole record is clearly substantial, plainly sufficient to support a finding or conclusion under the requirements of section 7(c), and material to the issues. It is exceedingly important. Difficulty has come about by the practice of agencies and courts to rely upon something less — suspicion, surmise, implications, or plainly incredible evidence. Although the agency must do so in the first instance, under this bill it will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment whether on the whole of the proofs brought to their attention the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action or inaction. In reviewing a case under this fifth category the court must base its judgment upon its own review of the entire record or so much thereof as may be cited by any party.

From proceedings in the Senate at p. 320:

> Subsection (c) of section 7 relates to evidence. It provides that except as statutes otherwise provide, the proponent of a rule or order has the burden of proof. While any evidence may be received, as a matter of policy agencies are required to provide for the exclusion of irrelevant and unduly repetitious evidence, and no sanction may be imposed, or rule or order issued, except as supported by relevant reliable, and probative evidence. Any party may present his case or defense by oral or documentary evidence, may

submit rebuttal evidence, and may conduct reasonable cross-examination. However, in the case of rule making or determining applications for initial licenses, the agency may adopt procedures for the submission of evidence in written form so far as the interest of any party will not be prejudiced thereby.

Mr. Austin. Mr. President, at that point I wish the Senator from Nevada would yield for a question.

Mr. McCarran. I gladly yield to the Senator from Vermont.

Mr. Austin. Did the committee intentionally choose the language, "except as supported by relevant, reliable, and probative evidence" in order to avoid the rule of scintilla of proof? This phrase is very significant as I see it. On the review, for example, the case, in order to carry through as decided by the agency, would have to be supported by relevant, reliable, and probative evidence. That is, in my opinion, a very important forward step in judicial procedure, to say nothing about administrative procedure. For my part I am glad to see it in the bill.

Mr. McCarran. Let me say to the Senator from Vermont that in the preparation of this bill many obstacles were encountered. Some of us insisted that the testimony must be relevant, material, and competent, and that nothing else should be taken. However, representatives of agencies came before us and presented their views, saying that such a rule would curtail their operations, and that they ought to be given greater latitude. They said to us, "We are not lawyers. We are acting in a quasi-judicial capacity. We ought to be able to go outside and get hearsay

testimony, if you please. We might be able to indulge in theory." So rather than curtail the agencies, we sought an intermediate ground which we thought would be protective of the rights of individuals, and at the same time would not handicap the agencies. So we said to them, "You may go outside and get what would be secondary evidence, or hearsay; you may perhaps even go into the realm of conjecture; but when you write your decision it must be based upon probative evidence and nothing else. If in the formation of your decision you consider other than probative evidence, your decision will be subject to being set aside by a court of review."

In other words, we did not wish to destroy the administrative agencies or prescribe the methods under which they have been operating. Some of us know that in committees of the Senate we very fequently hear evidence which we know is hearsay. I doubt very much if any hearing is ever conducted in which, to some extent, hearsay is not admitted. But we believe and we now believe, that reasonable men can sift the grain from the chaff. Then we laid down the rule that the administrative agencies must not make a finding which impinges upon an individual unless there is behind such finding probative evidence to sustain it. That is what we have worked out in this bill. I have given the explanation at some length in answer to the Senator from Vermont.

Mr. Ferguson. Mr. President, will the Senator yield—

Mr. McCarran. I yield.

Mr. Ferguson. Would the Senator, then, say that the judgment or decision of the agency must be based upon stronger proof than a scintilla of evidence?

Mr. McCarran. Very much stronger.

Mr. Ferguson. The old rule which applied in the courts, particularly on certiorari, was that if there was any evidence to sustain the verdict or judgment, it should be sustained. The courts have many times so held. The Senator would say, would he not, that something more than "any evidence" is required to sustain such a decision?

Mr. McCarran. The answer is in the affirmative. We say that the evidence must be substantial probative evidence.

Mr. Ferguson. So we are changing the rule which has been applied in the past that any evidence, or a scintilla of evidence, as it is sometimes defined, is sufficient to sustain a verdict or judgment.

Mr. McCarran. We tried as best we could to establish a guide for administrative groups so that they would apply the rule in such a way that there would be substantial probative evidence behind their findings, and so that they could say, "We are not afraid to have our findings reviewed by a court."

Mr. George. Mr. President, will the Senator yield?

Mr. McCarran. I yield.

Mr. George. The courts have many times held that if there is any evidence to sustain the findings of an adminstrative board under the statute, the courts have no power to intervene. If this bill should become a law would that rule, as heretofore construed by the courts, remain in effect?

Mr. McCarran. The courts have given various constructions. The courts, in reviewing an order, are governed by the provisions of section 10(e), which states the substantial-evidence rule. In other words, in some instances the courts have held that there must be substantial evidence. We are saying that there must be probative evidence of a substantive nature, and that even though the commission or bureau may take hearsay evidence in its hearings, it must have some probative evidence to sustain its finding.

Mr. George. The point I wish to raise is that some of the acts of Congress, particularly those enacted in recent years, have led the courts to hold—and they so hold—that if there be any evidence to sustain the finding of a board or agency, the court has no power to interfere with it.

Mr. McCarran. I would put it in this way—

Mr. George. Would the enactment of this bill require some substantial or probative evidence to support such a finding?

Mr. McCarran. Yes.

Mr. George. Take the labor-relations cases. Senators are familiar with them. The circuit courts have frequently complained against what the Labor Relations Board did, but have said, "We are powerless to interfere with it." Would this bill change that rule, if the court were of the opinion that there was no probative evidence?

Mr. McCarran. Yes; it would change that rule.

Mr. George. I am pleased to hear it.

Mr. McCarran. I thank the Senator.

EXCERPTS FROM SENATE DOC. 248

From the proceedings in the House of Representatives at p. 364:

EVIDENCE, SECTION 7(C)

Subsection (c) of section 7 is one of the more important provisions of the bill. In its final report the Attorney General's Committee on Administrative Procedure stated that—pages 70-71:

> Although administrative agencies may be freed from observance of strict common-law rules of evidence for jury trials, it is erroneous to suppose that agencies do not, as a result, observe some rules of evidence. * * * Abuses in admitting remote hearsay and irrelevant or unreliable evidence there surely have been. * * * That strict adherence to standards of relevance and probative value should be observed needs no underscoring. A diffuse record dissipates the energies of the parties and the deciding authorities and distracts attention from the issues. Careless admission of evidence for what it is worth—a practice not infrequent among trial examiners—swells the record beyond its necessary limits.

Section 7 (c) of this bill provides that the proponent of a rule or order has the burden of proof except as statutes otherwise provide. It authorizes

agencies to receive any evidence, although as a matter of policy they are required to provide for the exclusion of irrelevant, immaterial, or unduly repetitious matter. Thus, the mere fact that such matter is in the record would not of itself be reversible error. The principal provision of the subsection provides that no sanction may be imposed or rule or order be issued except upon consideration of the whole record or such portions as any party may cite and as supported by and in accordance with reliable, probative, and substantial evidence. The parties are authorized to present documentary, oral, and rebuttal evidence and to conduct reasonable cross-examination. In rule making or determining applications for initial licenses agencies may adopt procedures for the submission of the evidence in written form, so far as the interest of any party will not be prejudicial thereby.

The requirement that agencies may act only upon relevant, probative, and substantial evidence means that the accepted standards of proof, as distinguished from the mere admissibility of evidence, are to govern in administrative proceedings as they do in courts of law and equity. The same provision contains two other limitations—first, that the agency must examine and consider the whole of the evidence relevant to any issue and, secondly, that it must decide in accordance with the evidence. Under these provisions the function of an administrative agency is clearly not to decide arbitrarily or to act contrary to the evidence or upon surmise or suspicion or untenable inference. Mere uncorroborated hearsay or rumor does not constitute substantial evidence—see Edison Co. v. Labor Board (305 U.S. 197, 230). Under this provision agencies are not authorized to decide in accordance with preconceived ideas or merely to sustain or vindicate prior administrative

action, but they must enter upon a bona fide consideration of the record with a view to reaching a just decision upon the whole of it.

From the proceedings in the House of Representatives at p. 370:

SCOPE OF REVIEW, SECTION 10 (E)

The final subsection or section 10 states the extent or degree of review which courts are required to afford under this bill. I have already referred to the exemption of situations in which Congress has specifically withheld review or in which action has by law been committed to the absolute discretion of administrative agencies.

Subsection (e) of section 10 requires courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions and the determination of the meaning or applicability of any agency action. They must compel action unlawfully withheld or unreasonably delayed. They must hold unlawful any action, findings, or conclusions which they find to be, first, arbitrary or an abuse of discretion; second, contrary to any provision of the Constitution; third, in violation of statutes or statutory rights; fourth, without observance of procedure required by law; fifth, unsupported by substantial evidence in any case reviewed upon the record of any agency hearing provided by statute; or, sixth, unwarranted by the facts so far as the latter are subject to trial de novo. In making these determinations the court is to consider the whole record or such parts as any party may cite and, where error has been fully cured prior to the effective date of agency action, the courts may apply the rule respecting nonprejudicial error.

EXCERPTS FROM SENATE DOC. 248

The term "substantial evidence" as used in this bill means evidence on the whole record as reviewed by the court and in the exercise of the independent judgment of the reviewing court is material to the issues, clearly substantial, and plainly sufficient to support a finding or conclusion affirmative or negative in form under the requirements of section 7(c) heretofore discussed. Under this section the function of the courts is not merely to search the record to see whether it is barren of any evidence, or lacking any vestige of reliable and probative evidence, or supports the agency action by a scintilla or by mere hearsay, rumor, suspicion, speculation, and inference —cf. *Edison Co. v. Labor Board* (305 U.S. 197, 229-30). Under this bill it will not be sufficient for the Court to find, as the late Chief Justice Stone pointed out within the year, merely that there is some "tenuous support of evidence"—*Bridges v. Wixon* (326 U.S. at 178). Nor may the bill be construed as permitting courts to accept the judgments of agencies upon unbelievable or incredible evidence.

Where there is no statutory administrative hearing to which review is confined, the facts pertinent to any relevant question of law must of course be tried and determined de novo by the reviewing court.

Whether a court is proceeding upon an administrative or a judicial record, the requirement of review upon the whole record means that courts may not look only to the case presented by one of the parties but must decide upon all of the proofs submitted.

Referring to Section 10(e) (5) [5 U.S.C.A. #1009(e) (5)] from the proceedings in the House of Representatives at p. 378.

Excerpts From Senate Doc. 248

Fifth. "A decision which is unsupported by substantial evidence" can be set aside. I mentioned just a little while ago that many cases in which decisions have been rendered upon a mere scintilla of evidence, and not on the weight of the evidence, have been discovered. In many instances the decisions have been based upon evidence which is not competent. But under the provisions of this bill it is required that all such decisions shall be based upon and predicated upon substantial evidence. That is the only fair basis upon which decisions of this character should be made by either a court or any agency assuming the authority to hear and determine cases.

APPENDIX H

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. 65-H-530

PLAINTIFF DEMANDS TRIAL BY JURY

B. A. WATSON

v.

TARPON SHIPPING COMPANY

COMPLAINT

Plaintiff complaining of the Defendant, TARPON SHIPPING COMPANY, respectfully states and alleges upon information and belief:

First Claim For Relief:

First: That at all times hereinafter mentioned the Defendant TARPON SHIPPING COMPANY, was and still is a foreign corporation, having Transatlantic Shipping Company, Inc. with offices at 1300 Texas Avenue, Houston, Texas, as its agent for service of process. Its principal office and place of business is located out of the State of Texas.

Second: That at all times hereinafter mentioned in this claim Plaintiff was and still is a citizen of the State of Texas and resides in Houston, Harris County, Texas in the Southern District of Texas.

Third: That jurisdiction properly lies in this Court by virtue of the fact of diversity of citizenship with the amount of controversy exceeding the sum of $10,000.00, exclusive of interest, costs and disbursement.

Fourth: That on or about the 2nd day of August, 1965, the Defendant, TARPON SHIPPING COMPANY, owned and operated a certain vessel known as the Tarpon Bay.

Fifth: That at all times hereinafter mentioned in this claim the Defendant, TARPON SHIPPING COMPANY, managed, operated, manned, provisioned, supervised and controlled the Tarpon Bay, and that at all times hereinafter mentioned in this claim the Tarpon Bay was situated upon navigable waters of the United States and in navigation at a dock at the port of Houston, Texas.

Sixth: That at all times hereinafter mentioned in this claim the Plaintiff was employed by Port Stevedoring Co., Inc., a stevedore, and was aboard the vessel in the capacity of a seaman and longshoreman.

Seventh: That at all times hereinafter mentioned in this claim all of the officers, crew and master of the aforementioned vessel were in the employ of the Defendant, TARPON SHIPPING COMPANY.

Eighth: That the Plaintiff is entitled to the benefits of the general maritime law of the United States.

Ninth: That on or about the 2nd day of August, 1965, the Plaintiff sustained injuries to his low back when he slipped on the deck of the vessel which was coated with some oil or grease and littered with loose lines, thereby sustaining injuries to his body when he fell.

Tenth: That is was the duty of the Defendant, its officers, agents, servants and employees to provide Plain-

tiff and assure him of a seaworthy vessel and safe, adequate, suitable and proper working conditions.

Eleventh: The injuries sustained by Plaintiff were due to the negligence of the Defendant, its officers, agents, servants and employees.

Twelfth: By reason of the aforesaid Plaintiff sustained injuries and he has suffered and is continuing and probably will continue to suffer pain, agony and mental anguish; has been and will be prevented from attending to his usual duties, resulting in loss of earnings; has been obliged to undergo hospital, surgery and medical care and attention and is still undergoing treatment and will be obliged to incur liability for same, all to his damages in the sum of $250,000.00.

Second Claim for Relief:

Thirteenth: Plaintiff repeats, reiterates and re-alleges each and every allegation continued in Paragraphs First through Twelfth of this Complaint with the same force and effect as if set forth at length herein.

Fourteenth: It was the duty of the Defendant, its officers, agents, servants and employees, to provide Plaintiff with a seaworthy and safe vessel and appliances and crew to keep same in a seaworthy condition.

Fifteenth: That the aforesaid injuries sustained by Plaintiff were caused by the failure of the Defendant, its officers, agents, servants and employees to provide a seaworthy vessel and safe vessel, appliances and crew and to keep same in a seaworthy condition.

Sixteenth: That by reason of the failure of the Defendant, its agents, servants and employees to provide

a seaworthy and safe vessel, appliances, crew and workmen, Plaintiff has been damaged in the sum of $250,000.00.

WHEREFORE, premises considered, Plaintiff demands judgment against Defendant, TARPON SHIPPING COMPANY, in the sum of Two Hundred Fifty Thousand Dollars ($250,000.00), together with interest, costs and disbursements.

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